U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 25 November 2003 **CASE NO.: 2002-LHC-1194**

OWCP NO.: 07-159350

IN THE MATTER OF:

WILL L. BIAS

Claimant

v.

TRANSOCEAN TERMINAL OPERATORS (D/B/A P&O PORTS LOUISIANA, INC.)[1]

Employer

and

P&O PORTS LOUISIANA, INC.

Carrier

APPEARANCES:

WILLIAM S. VINCENT, JR. ESQ.

For The Claimant

WILLIAM C. CRUSE, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq.,

[1] The caption appears as amended at the hearing.

(herein the Act), brought by Will L. Bias (Claimant) against Transocean Terminal Operators (Employer) and P&O Ports Louisiana, Inc. (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing which commenced on February 28, 2003, and concluded on March 7, 2003, in Metairie, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 23 exhibits, Employer/Carrier proffered 20 exhibits which were admitted into evidence along with one Joint Exhibit. The record was left open for 30 days for depositions of Vocational Expert Favolora and Drs. Koy, Culver and Bunch. CX-1 through CX-23, EX-1 through EX-17, EX-19, EX-21, EX-23 and JX-1 were received. EX-18 was reserved for the completion of Dr. Bunch's deposition.[2] EX-2O and EX-22 were withdrawn. This decision is based upon a full consideration of the entire record.[3]

Post-hearing briefs were received from the Claimant and the Employer/Carrier on June 31, 2003 and July 1, 2003, respectively. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

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[2] Dr. Bunch's original deposition transcript, which was submitted at the hearing as Employer's Exhibit 18, was not supplemented post-hearing, and the record was closed on May 22, 2003. On May 21, 2003 Claimant filed a "Motion to Exclude the Functional Capacity Evaluation and Deposition of Dr. Bunch," which was denied on July 2, 2003 after Employer/Carrier filed their opposition on June 13, 2003. Accordingly, Dr. Bunch's deposition transcript submitted at the formal hearing is hereby received as Employer's Exhibit 18.

[3] References to the transcript and exhibits are as follows: Transcript: Tr.___; Claimant's Exhibits: CX-___; Employer/Carrier's Exhibits: EX-___; and Joint Exhibit: JX-___.

1. That the Claimant was injured on February 25, 2001.

2. That Claimant's injury occurred during the course and scope of his employment with Employer.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That the Employer was notified of the accident/injury on February 25, 2001.

5. That Employer/Carrier filed Notices of Controversion on September 5 and 12, 2001.[4]

6. That an informal conference before the District Director was held on November 27, 2001.

7. That Claimant received a total of $2,112.00 in compensation benefits for his temporary total disability status from February 26, 2001 through March 25, 2001.

8. That Claimant's average weekly wage at the time of injury was $792.00.

9. That medical benefits for Claimant have been paid pursuant to Section 7 of the Act.

II. ISSUES

The unresolved issues presented by the parties are:

1. The nature and extent of Claimant's disability.

2. Maximum medical improvement.

3. Claimant's entitlement to and authorization for medical care and services.

4. Attorney's fees, penalties and interest.

[4] Another Notice of Controversion was apparently filed on December 12, 2001. (EX-4, p. 3).

III. STATEMENT OF THE CASE

The Testimonial Evidence

Christine Kelly

Christine Kelly testified she was employed by Carrier as a claims adjuster from February 2001 through October 2002. She was assigned to Claimant's claim and invited him to her office to take his recorded statement. On March 1, 2001, Claimant was in "obvious discomfort" when he arrived with his wife at Ms. Kelly's office. Claimant stated he was not relieved by post-job injury medical treatment he received at the emergency room. Consequently, Ms. Kelly discussed treatment by an orthopedic specialist. Claimant desired treatment with Dr. Terry Habig, a physician for the New Orleans Saints. Ms. Kelly was unable to schedule an appointment because Dr. Habig did not accept the longshore fee schedule. Claimant had no other preference, but requested treatment soon due to his discomfort. (Tr. 41-52).

Ms. Kelly recommended Westside Orthopaedic Clinic (WOC). She worked as an assistant for eight years at WOC, and her mother was also a patient there.[5] She never stated she worked for Dr. Katz at WOC because Dr. Katz did not work at WOC during Ms. Kelly's tenure there. (Tr. 84-85, 91). Likewise, she never represented Dr. Katz performed surgery on her mother because Dr. Katz did not provide that treatment. (Tr. 53-54, 61). Ms. Kelly called WOC to arrange the earliest appointment, which was available with Dr. Katz, who specializes in spinal injuries. (Tr. 52-54).

Ms. Kelly presented a choice of physician form to Claimant.[6]

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[5] Claimant's wife recalled that Ms. Kelly stated she worked at Dr. Katz's orthopedic clinic for 5-8 years. (Tr. 250-257).

[6] The choice of physician form provides in pertinent part:

> . . . [Employer] has explained to me that I have a choice of physician for the treatment of my job related illness or injury. I understand the choice is mine, and also understand that I may not change physicians at a later date without prior written authorization and consent of [Employer] or the District Director of [OWCP]. My choice of physician is _____ in the specialty of _____. Even though this physician may have been recommended to me by persons

She "explained to [Claimant] what the document was about, read it with him, . . . [and] made sure that he understood that it was his choice of physician that, even though I had given him the name and made the appointment . . . ." She further explained to Claimant that, by choosing Dr. Katz as his physician, Claimant was "not allowed another choice of physician in the same specialty without permission from [Employer/Carrier]." Claimant expressed his understanding of the form after he and his wife read the form and discussed it with Ms. Kelly. Subsequently, Claimant signed the choice of physician form. Ms. Kelly did not inform Claimant that signing the form was necessary for treatment with Dr. Katz. (Tr. 54-60, 67; EX-11). Before signing the form, Ms. Kelly explained to Claimant that he could treat with any treating physician of his choice. (Tr. 86).

Shortly after he treated with Dr. Katz, Claimant reported to Ms. Kelly that Dr. Katz recommended physical therapy which was causing increased pain. Consequently, Claimant requested to discontinue therapy. At that time, Claimant did not request a change of physicians. On March 22, 2001, after Claimant treated with Dr. Katz for several weeks, Claimant provided a handwritten letter to Ms. Kelly requesting another physician. She denied the request because there were no grounds to change. (Tr. 64-67).

Claimant later provided a written request to Ms. Kelly seeking treatment with Dr. Vogel, Claimant's choice of neurosurgeon. Employer/Carrier did not authorize Claimant's treatment with Dr. Vogel because Dr. Katz previously released Claimant to return to work after Dr. Katz "examined Claimant, evaluated him, treated him with multiple modalities, physical therapy, medications" and ordered an MRI which "was perfectly normal." (Tr. 67-69).

> working for [Employer], I understand that I have no obligation to use this physician, but nevertheless choose to do so of my own free will. I acknowledge that no duress of any kind has been applied by [Employer] to influence the choice I have made. I agree to inform [Employer] in writing immediately upon deciding to seek the care of any other physician.

"Dr. Ralph Katz," whose specialty is "orthopaedics," is identified in handwriting as Claimant's choice of physician. The form is dated "3/1/01" and signed by Claimant. (EX-11).

After Claimant treated with Dr. Vogel, Employer/Carrier referred him to another neurosurgeon, Dr. Robert Applebaum, who restricted him from work pending further testing and recommended a physiatrist's evaluation. (Tr. 69-77; EX-9, p. 5).

On cross-examination, Ms. Kelly stated Claimant's March 22, 2001 handwritten request for another physician was the first such request made by Claimant. Although Claimant indicated he desired a change because he was still in pain and did not like physical therapy, he otherwise expressed no complaints regarding his treatment with Dr. Katz. (Tr. 86-89; CX-14, p. 22).

Charles Aprill, M.D.

Dr. Aprill, who is board-certified in diagnostic radiology, testified as an expert in the field of radiology. (Tr. 93; CX-16). He was asked by Claimant's attorney to review Claimant's cervical and lumbar MRI scans, myelogram and post-myelogram CT scans from 1999 and 2001. He opined the 2001 cervical MRI demonstrated a "reverse of the normal curve," which may be caused by muscle tension, and a "small posterior disc protrusion in the midline at [C]5-6 and a tiny disc protrusion just to the left of midline at C4-5." The lumbar MRI revealed no abnormality. The diagnostic studies clearly established that Claimant's spinal cord is not compressed. (Tr. 94-103; CX-4; EX-10; EX-12).

On cross-examination, Dr. Aprill compared his March 1999 report of Claimant's February 1999 films with his June 2001 report of Claimant's March 2001 films. He stated there were no abnormalities in Claimant's lumbar spine revealed in either set of films. Dr. Aprill concluded that the disc abnormalities revealed in Claimant's February 1999 and March 2001 cervical films are the same, indicating no change from 1999. However, the February 1999 MRI revealed no reversal of the lordotic curve, which is a significant finding. Dr. Aprill concluded the straightening of the cervical curve was an additional finding indicating "a little bit of a change."[7] Dr. Aprill indicated he was not qualified to determine whether the abnormalities on Claimant's MRIs were symptomatic for Claimant. (Tr. 118-127; EX-12; CX-4).

[7] The March 15, 2001 MRI report noted that a "gentle reversal" of Claimant's cervical lordosis "may be merely on the basis of neck flexion and position within the neck coil." Muscle spasms were not discussed. (EX-10, p. 1).

Jacqueline Carroll, RN, JD

Jacqueline Carroll, a registered nurse and licensed attorney, testified she accompanied Claimant to the FCE at Counsel for Claimant's request. She helped Claimant answer questions to a questionnaire while awaiting Dr. Bunch and took notes during the FCE. Her proffer as an expert in nursing was denied, but she was accepted as a fact witness. (Tr. 136-150).

According to Ms. Carroll, Claimant's blood pressure rose from 138/82 before the FCE to 150/100 during the FCE. Dr. Bunch recommended Claimant seek treatment for his high blood pressure and led Claimant and Ms. Carroll to a nearby medical facility for retesting. Claimant's blood pressure dropped to 148/98 when it was retested. Dr. Bunch stated the high blood pressure was pain-related. (Tr. 150-151; EX-17, p. 3).

Carlos Kronenberger, Ph.D.

Dr. Kronenberger was accepted as an expert in psychology. Claimant's counsel asked him to review Dr. Bianchini's psychological opinions. He also evaluated Claimant on February 17, 2003.[8] (Tr. 172-176; CX-9; CX-17).

Dr. Kronenberger noted the Minnesota Multiphasic Personality Inventory (MMPI) is a 567-question test that is a "standardized measure of personality functioning, psychopathology or symptomatology and so-called test-taking attitudes" which is written at an "eighth-grade reading level." The test may be provided via audiotape for individuals who may not read at an eighth-grade level; however, there may be complications related to the testing subject's understanding and comprehension of the questions. Dr. Kronenberger added that the MMPI would not be accurate for an individual whose IQ is below 80; however, he was aware of no studies which supported such a conclusion. (Tr. 176-182).

[8] Claimant reported sustaining an injury when he was "operating a crane on the dock; the weight fell from the crane and he was jerked around in the crane's cabin." He sustained injuries to his "back, neck and shoulders" and experienced pain in his "lower back, shoulder and neck, particularly on the right side of his body." The pain was "constant and sometimes severe." Claimant reported occasional numbness and tingling "which makes it hard for him to stand, sit or walk for any length of time." (CX-9, pp. 1-2).

Dr. Kronenberger administered other tests which revealed Claimant functioned at the fourth to fifth-grade reading level. Claimant's IQ was 70 to 72, based on prior tests administered by Drs. Mullener and Bianchini. Dr. Kronenberger stated the first half of Claimant's MMPI results constituted a valid profile, but Claimant may not have exerted himself consistently through the second half of the entire examination. (Tr. 182-189).

According to Dr. Kronenberger, Claimant demonstrated higher scores on only one of six controls, which is not enough to invalidate the test. The results of Claimant's MMPI indicated Claimant tended to over-report his problems. (Tr. 202-208).

Dr. Kronenberger reviewed Dr. Bianchini's other test results and concluded Claimant was not malingering cognitive deficits. Claimant's performance on the Milton Clinical Multiaxial Inventory (MCMI) yielded "slightly higher" results indicating a tendency for augmentation, or "an overreporting of problems." However, Claimant's profile is "a pretty common one to find for individuals with these types of injuries that he has sustained, with chronic pain and diffuse anxiety and depression, but he's not going off the scale on any of these anxiety and depression scales." (Tr. 189-194).

Dr. Kronenberger administered other psychological tests which he opined were preferable to an MMPI due to Claimant's IQ and reading ability. Claimant's results on a Personality Assessment Inventory (PAI) were slightly elevated on three of four scales, namely somatization, depression and anxiety. (Tr. 194-199). Claimant's results on a Westhaven Yale Multidimensional Pain Inventory (MPI) revealed emotional distress associated with Claimant's disability and need for psychological treatment which would help Claimant understand the "connection between the mind and the body and how best to help himself in this situation. (Tr. 194, 200-201).

Dr. Kronenberger diagnosed Claimant with a pain disorder which involves complicating psychological factors that augment Claimant's pain and make it worse. He opined Claimant suffers from dysthymic disorder of moderate intensity. The disorder includes periods of "depression, helplessness, low self esteem, a sense of foreshortening of their lives, that they are pessimistic [and] lacking in energy." Sleep disorders, gastrointestinal distress, anxiety and diminished confidence are also associated with dysthymic disorders. Claimant should be treated "very aggressively with an anti-depressant and receive

concomitant psychotherapy." (Tr. 208-214). Claimant's recent weight gain constitutes an appetite disturbance which is "probably an indication that the individual is very depressed [and] very inactive." (Tr. 223).

According to Dr. Kronenberger, Claimant is disabled from returning to work due to the severity of his psychological symptoms, which are considered "moderate to severe." Claimant is unable to sustain a job which demands working a 40-hour week due to deficits in attention and concentration.[9] Claimant may understand simple instructions, but cannot be expected to understand complex instructions. (Tr. 214-222).

On cross-examination, Dr. Kronenberger admitted he was asked by Claimant's counsel to provide a "targeted consultation" in which he reviewed records only related to treatment or evaluation by Drs. Morse, Bianchini and Mullener. Dr. Kronenberger acknowledged his opinion would change if he was provided medical records from Drs. Katz, Glynn, Bunch and Culver indicating Claimant was exaggerating his complaints and demonstrated symptom magnification. If some of the physicians concluded there was no objective basis for Claimant's physical complaints based on diagnostic testing, Dr. Kronenberger admitted, "that would have a huge impact on how I would assess the problem," and "of course, it would alter my opinion." Without reviewing such medical opinions, Dr. Kronenberger could not estimate the extent to which his opinions would change. (Tr. 225-234).

Dr. Kronenberger opined Claimant's MMPI revealed a profile characteristic of individuals that experience pain or bodily concerns with an admixture of anxiety or histrionic tendencies. Such individuals "tend to be self-centered and very demanding and they wish to have a lot of attention from others and very often directed at physical symptoms that they talk about to gather sympathy and act helpless and so forth." According to Dr. Kronenberger, such individuals are unaware that they are exaggerating symptoms. (Tr. 234-236).

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[9] On February 21, 2003, Claimant reported "occasional" problems with concentration to Dr. Kronenberger, who noted Claimant's "attention and concentration were somewhat below par and a few questions were repeated." Dr. Kronenberger also noted Claimant's "concentration on a short-term task was adequate." (CX-9, p. 2).

Dr. Kronenberger described somatization as a psychological condition in which individuals become so focused on symptoms that there are "more symptoms evident to the person than actually found upon physical examination." The assumption from Claimant's MMPI is that he not conscious of exaggerating his complaints, which are "out of proportion to the objective findings. (Tr. 236-244).

On re-direct examination, Dr. Kronenberger concluded that a somatic problem such as Claimant's may be disabling. If Claimant did not suffer psychiatric complaints, namely somatization and depression prior to his job injury but suffered the problems following the injury, Dr. Kronenberger opined that the accident had a causal connection with Claimant's psychiatric complaints. (Tr. 244-249).

Willy Demetra Bias

Mrs. Bias testified that she has been married to Claimant for 5 years. She accompanied Claimant to Ms. Kelly's office to discuss a choice of physicians. Ms. Kelly directed Claimant not to return to an emergency room physician. Rather, Ms. Kelly stated she would find Claimant a specialist for his back complaints. Ms. Kelly recommended Dr. Katz, who was a "great doctor, he was her mom's doctor, and also the Saints' doctor." (Tr. 250-257).

Ms. Kelly asked Claimant to sign a choice of physician form to see Dr. Katz. Claimant signed the form, which was neither read nor explained to Claimant by Ms. Kelly. Mrs. Bias read the form and recalled a provision for changing physicians. Ms. Kelly informed Claimant and his wife that she worked at Dr. Katz's orthopedic clinic for 5-8 years. (Tr. 250-257).

According to Mrs. Bias, Claimant started complaining about Dr. Katz one week after beginning treatment. (Tr. 263-264). Mrs. Bias's sister-in-law prepared Claimant's request for a second choice of physician because Claimant has trouble reading and writing. (Tr. 257-259; CX-14, p. 22).

Prior to his accident, Claimant was active, friendly, outgoing and capable of "anything." He was "very helpful around the house." After his accident, Claimant's body weight increased from 193 to 275 pounds. Claimant became "very moody, always depressed, crying and difficult to deal with." Claimant is presently unable to help around the house, and Mrs. Bias is responsible for "everything." She must help Claimant bathe and

"put on his socks, tie his shoes." There is stress on the relationship between Claimant and his wife due to a loss of intimacy. (Tr. 259-263; CX-18).

On cross-examination, Mrs. Bias, who completed high school and some college as a B-student, admitted she read Claimant's choice of physician form and understood the form to mean that "Dr. Katz was the doctor that [Claimant] was choosing . . . ." She understood there was no obligation to treat with Dr. Katz. Mrs. Bias denied that Claimant requested Dr. Terry Habig. (Tr. 266-268; EX-11).

Claimant

Claimant was born on April 3, 1967 and was 35 years old at the time of formal hearing. He graduated from St. Augustine high-school as a "C-average" student who played football, baseball and basketball. He worked as a longshoreman for six or seven years prior to his job injury, when he was working as a regular gangman. (Tr. 291-293, 311-315).

When his gang worked on ships, Claimant was a crane operator who was required to climb ladders ranging from 30 to 50 feet high. When his gang worked on barges, he was required to lift 110-pound sacks and other materials. He was also required to climb ladders, bend and stoop. (Tr. 293-304).

Claimant was injured inside of a crane cab that was 30 or 40 feet above the deck of a ship while he was operating the crane to unload cargo. The boom on the crane fell, which jerked Claimant around inside the cab and frightened him. The flag man on duty assisted Claimant down the ladder to await an ambulance. (Tr. 316-318, 362).

Claimant was brought to Touro Hospital Emergency Room (Touro), where he was treated by a physician. He was prescribed some pain medications and told to return for a March 5, 2001 follow—up appointment at Touro. He did not keep the appointment because Ms. Kelly told Claimant to visit her office rather than go to the appointment. At Ms. Kelly's office, Claimant, who was accompanied by his wife, was directed to complete a choice of physician form in favor of Dr. Ralph Katz. (Tr. 318-320, 325).

According to Claimant, Ms. Kelly described Dr. Katz as a neck and back specialist who successfully treated Ms. Kelly's mother. Claimant was impressed by Ms. Kelly's explanation that Dr. Katz was a physician for the New Orleans Saints football

players. Ms. Kelly informed Claimant and his wife that he must complete a choice of physician form in favor of Dr. Katz if he desired to treat with that physician. Claimant voluntarily signed the document, noting that Ms. Kelly "didn't twist my arm" to obtain his signature. (Tr. 320-322). Ms. Kelly informed Claimant that he must provide a written request to change physicians should he desire a change in the future. (Tr. 328).

Claimant never heard of Dr. Habig until Ms. Kelly mentioned his name at the formal hearing. When he went to Dr. Katz, who did not appear interested in his complaints, Claimant was provided with hip injections, medication prescriptions and was directed to undergo physical therapy at Dr. Katz's office three times weekly. Physical therapy increased Claimant's pain. He reported the increased pain to Ms. Kelly, but did not mention changing physicians at that time. (Tr. 320-329).

On March 19, 2001, Dr. Katz released Claimant to return to work without restrictions. Subsequently, on March 22, 2001, Claimant provided Ms. Kelly with a written request to change physicians, but Ms. Kelly refused to authorize the change. Claimant did not return to work because of ongoing pain. He returned for periodic follow-up visits with Dr. Katz. On July 2, 2001, Claimant treated with Dr. Vogel at his attorney's direction. Dr. Vogel previously treated Claimant following one of his prior car accidents. (Tr. 328-331; CX-6; CX-14, p. 22).

For seven weeks between July 23, 2001 and September 3, 2001, Claimant attempted to return to work despite ongoing pain. At times, Claimant's pain was severe enough that he could not work. On September 11, 2001, Claimant returned to Dr. Vogel, who restricted Claimant from returning to work pending evaluation and testing. Claimant was willing to undergo the recommended testing which was never performed. On December 22, 2001, Dr. Vogel told Claimant that follow-up visits were unnecessary until the completion of the testing. (Tr. 331-335; CX-1, p. 2; CX-6, p. 6).

According to Claimant, Employer directed him to treat with Dr. Applebaum, who appeared to express more interest in Claimant's complaints than did Dr. Katz. Like Dr. Vogel, Dr. Applebaum restricted Claimant from returning to work pending further testing. Ms. Kelly explained to Claimant that compensation benefits would be reinstated for the applicable period Claimant was restricted by Dr. Applebaum; however, additional benefits were never provided. (Tr. 335-338).

Pursuant to Dr. Applebaum's recommendation, Employer/Carrier approved a myelogram and post-myelogram CT scan on Claimant's neck and back. Following a review of the results of the testing, Dr. Applebaum released Claimant to return to work with restrictions against lifting more than 40 or 50 pounds. Although he did not indicate restrictions against specific postures at work, Dr. Applebaum generally told Claimant that returning to work would be painful. Claimant did not return to work. (Tr. 338-340; EX-10, pp. 3-4).

At some point, Claimant attended an informal conference in which it was explained that he could not treat with the same type of physician as Dr. Katz, who was Claimant's physician; however, Claimant could seek treatment with another type of physician. Following the informal conference, Claimant chose to treat with Dr. Kewalramani, who prescribed pain medications. Claimant was unaware whether Employer/Carrier paid for Dr. Kewalramani's treatment. (Tr. 340-342).

Claimant's attorney arranged treatment with Dr. Stuart Phillips. Dr. Phillips prescribed medications and referred Claimant to Touro pain clinic (the pain clinic). Dr. Phillips retired and transferred Claimant's case to Dr. Watermeier, who treated Claimant twice and also recommended the pain clinic. Claimant was treated at the pain clinic by Dr. Morse, who recommended ongoing treatment at the pain clinic. Claimant is willing to undergo Dr. Morse's treatment at the pain clinic, Employer/Carrier refused to authorize it. (Tr. 342-347).

Following treatment with Dr. Morse, Claimant treated with Dr. Glynn, but cannot recall the examination and treatment. Claimant next treated with two psychologists, Drs. Bianchini and Mullener. He underwent psychological testing prescribed by both psychologists and performed the tests with his best effort. Claimant did not understand all of the questions in the MMPI which he completed, but "did the best I could." Claimant was not told he could revisit questions which he failed to understand. (Tr. 347-353). He was on pain medication during psychological testing with Dr. Bianchini. (Tr. 363).

Following treatment with the psychologists, Claimant treated with Drs. Koy and Culver. He treated with another psychologist, Dr. Kronenberger, who administered more psychological testing which Claimant underwent at his best effort. Id.

Claimant described his current symptoms and physical complaints. He suffers leg, neck and back pain. He experiences pain in his right shoulder that runs down his right arm. He suffers from pain and weakness in the right side of his body in general. Fingers on his right hand tingle. He walks with a cane because of problems with his balance; however, the cane was not prescribed. Bending, standing and raising his arm are painful. Claimant takes medications and soaks in hot water to alleviate his symptoms. (Tr. 354-356). Employer/Carrier have not paid for Claimant's medications following Dr. Katz's treatment. (Tr. 363-364).

Claimant cannot perform any housework, the totality of which his wife performs. He cannot stand up or lift heavy items without experiencing pain. He suffers from depression and feelings of inadequacy, nervousness and momentary anger. He cries periodically. His relationship and intimacy with his wife has suffered. Before his job injury, Claimant felt "normal." (Tr. 356-359).

Claimant underwent an FCE at which he gave his best effort. He experienced increased pain during the FCE, and his blood pressure increased to the point he could not continue the FCE. Dr. Bunch recommended an evaluation by a nearby physician for a second opinion. Dr. Bunch indicated the FCE must have been painful for Claimant due to the increase in blood pressure during the FCE and the rapid decrease in blood pressure after the FCE was terminated. Prior to the FCE, Dr. Bunch instructed Claimant not to take pain medications. Claimant's attorney instructed him not to bring a cane to the FCE. (Tr. 360-364).

Claimant testified he cannot perform his prior job. He tried to get a job at fast-food establishments, but was unsuccessful. He was not provided a list of available jobs from Ms. Favolora, but was willing to seek employment recommended by Ms. Favolora. He was never offered any help with completing applications or performing a job search. (Tr. 364-367).

Prior to his job injury, Claimant was involved in two car accidents in which he sustained neck and back injuries. Both accidents resulted in settlements. Claimant missed as much as "a couple" of months from work due to the first accident and approximately one or two weeks due to the second accident. Other than some initial stiffness following his return to work after the first accident, Claimant suffered no ongoing physical problems from the car accidents. Pre-injury, Claimant weighed

between 190 and 200 pounds. Post-injury, Claimant's weight increased to 275 pounds or more. (Tr. 311-315, 362-363; CX-18).

On cross-examination, Claimant acknowledged his signature on the choice of physician form he completed in favor of Dr. Katz. He admitted that he read the form before he signed it. He understood the form meant that, "[t]o see Dr. Katz, I had to sign the form." He was not told that he "had to sign the form." Likewise, he was not told that he could not see another doctor. Although he experienced disabling pain during physical therapy prescribed by Dr. Katz for three times per week, Claimant would be willing to attempt treatment at the pain clinic which might demand physical therapy for as many as five times per week. Other than his return to longshore employment from August 2001 through September 2001, Claimant admitted he did not seek any other employment until January 2003. He sought work despite his ongoing condition because his family needed the money, not because his condition improved. (Tr. 368-384).

Kevin J. Bianchini, Ph.D.

Dr. Bianchini, who specializes in neuropsychology and clinical psychology, testified as an expert in the field of clinical psychology. On November 4 and 5, 2002, after other physicians experienced "difficulty finding physical explanation for [Claimant's] symptoms," Dr. Bianchini administered a psychological evaluation of Claimant at Dr. Glynn's request. On December 19, 2002, he reported Claimant's psychological and pain evaluation results. (Tr. 388-391; EX-15).

According to Dr. Bianchini, Claimant's results during the November 2002 evaluation coupled with his prior medical history indicated "a psychological overlay or psychological factors playing a role in [Claimant's] report of symptoms."[10] On

[10] During his November 2002 psychological pain evaluation with Dr. Bianchini, Claimant reported he was injured when a boom fell while operating a crane. He was "not belted and 'came out of the seat.' He 'bounced around and fell back to the edge of the seat.'" Claimant reported he was treated for a back injury at the emergency room. Claimant attributed the following to his job injury: back pain, neck pain, headaches, depression, panic, a "varied" lack of concentration, anger, anxiety, crying spells, and sleeplessness due to pain. He denied problems with memory loss or speech. He denied a history of head injury with a loss of consciousness; however, he may have sustained a head injury

psychological examination, Claimant was exaggerating his symptoms; however, it was "not clear that [Claimant] understands that he's doing that, which is what would be a diagnosis of malingering, if he understood he was exaggerating and was doing so intentionally." (Tr. 391-393).

Dr. Bianchini performed various tests to determine whether Claimant was exaggerating or malingering a loss of concentration or memory, which is considered "cognitive" malingering that does not affect whether Claimant was exaggerating or malingering physical symptoms of pain. Claimant was not cognitively malingering. (Tr. 400-401, 418-421; EX-18, pp. 22-23).

Dr. Bianchini also administered the MMPI, which indicated Claimant was exaggerating his symptoms. Dr. Bianchini disagreed with Dr. Kronenberger's conclusion that the MMPI might not be suitable to assess chronic pain. He stated Dr. Kronenberger's opinions are based on outdated research that has since been supplanted by more recent research establishing "widespread acceptance of the use of the MMPI." Likewise, Dr. Bianchini disagreed with Dr. Kronenberger's conclusion that the MMPI was an inadequate measure of Claimant's symptoms of pain due to Claimant's intelligence level. He stated the MMPI uses intrinsic indicators which identify inconsistencies due to a failure of understanding. Those indicators were not elevated which would suggest Claimant understood the questions which he answered consistently. In Claimant's case, those indicators were not elevated. (Tr. 403-404, 464; CX-9).

Dr. Bianchini discussed the Lees-Haley Fake Bad Scale (FBS), which is used to identify a pattern of reporting "nonauthentic" complaints of physical pain. Claimant's results were elevated, which indicated the tendency to "exaggerate physical complaints and possibly even exaggerate the attribution of those things to a specific event, like the accident in this case." (Tr. 409-412).

Dr. Bianchini agreed with Dr. Kronenberger that individuals with cognitive limitations might be at a disadvantage while attempting to feign disability because they would be less likely to do so without detection, but "it doesn't mean that they're not capable of doing it on some level." Likewise, it "certainly does not mean that people won't try" or that they would simply

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but denied residual problems. No symptoms of numbness or tingling were reported by Dr. Bianchini. (EX-15, pp. 12-13).

complain of "a lot of symptoms." Dr. Bianchini opined even children may intentionally produce symptoms. (Tr. 412-414).

Dr. Bianchini opined psychological intervention alone would not be helpful. Claimant "tends to see things in terms of physical problems" and is "unlikely to accept psychological explanations." Coupled with a recommendation for physical rehabilitation, "a brief course of counseling (six sessions) could be included as an adjunct," which "might be beneficial." Dr. Bianchini deferred to Dr. Glynn for a physical rehabilitation recommendation. He opined Claimant could return to work from a psychological perspective. (Tr. 414-416, 465).

On cross-examination, Dr. Bianchini testified he expected Claimant, a high-school graduate, to achieve higher test results upon general intellectual ability (IQ) testing. (Tr. 416-418). Claimant reads at the third-grade level. (Tr. 422).

Dr. Bianchini stated the MMPI was administered via audiotape due to Claimant's reading ability. Claimant performed well during the first 367 questions of the MMPI, but demonstrated some problems on the remaining 200 questions of the test. However, Dr. Bianchini agreed with Dr. Kronenberger that the MMPI results indicated only a "tiny" deviation from expected results, and opined the MMPI was valid. (Tr. 427-437, 452).

According to Dr. Bianchini, Claimant reported complaints of depression, marital problems, and sleeplessness at night due to pain. Dr. Bianchini noticed evidence of Claimant's loss of interest in most activities and that Claimant's weight gain qualified as an appetite disturbance. When Dr. Bianchini questioned Claimant about difficulties with concentration, Claimant reported "it varies" and did not "indicate much aside from that when he begins thinking about his problems, then he has some trouble." (Tr. 438-445)

Dr. Bianchini indicated the thrust of Claimant's reports of depression and symptoms "focused on how badly physically injured [Claimant] was," but he questioned the complaints of depression "since the record doesn't seem to reflect [Claimant] being badly injured . . . ." (Tr. 445-446). Dr. Bianchini concluded it is unclear that Claimant experiences physical problems which are causing psychological distress. (Tr. 464-465). Dr. Bianchini opined Claimant's physical complaints were exaggerated and somatization was high, noting Dr. Kronenberger reported and discussed Claimant's PAI test results which were consistent with exaggeration. (Tr. 452-455; CX-9, pp. 3-4).

Gary Glynn, M.D.

Dr. Glynn, who is board-certified in physical medicine and rehabilitation with sub-specialties including spinal cord injury medicine, pain medication and electromyography, testified as an expert in the areas in which he is board-certified. (Tr. 466-472). At Employer/Carrier's request, he reviewed Claimant's medical records, clinically examined Claimant[11] and prepared three reports on May 16, 2002, August 22, 2002 and February 28, 2003.[12] (Tr. 472; EX-8; EX-23).

Dr. Glynn did not recommend an EMG of Claimant's upper and lower extremities, based on his evaluation of Claimant and Claimant's medical history and records indicating "uniformly, normal neurological examination." (Tr. 474-477, 482-483). After he examined Claimant, Dr. Glynn opined an FCE was unnecessary because it would merely confirm Claimant's history of symptom exaggeration; however, he recommended a pain psychology evaluation. An FCE was nevertheless performed, indicating exaggeration. (Tr. 479-480, 483-484; EX-8, p. 6).

From a physical perspective, Dr. Glynn opined a pain clinic would not be helpful for Claimant, based on Claimant's history

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[11] Claimant reported the following symptoms which he related to his job injury: back pain which was greater on the right side and which radiated into his "legs and groin" and sometimes "into his feet," neck pain radiating through his right shoulder and arm occasionally into "any and all the fingers at various times," and headaches. He reported he was "somewhat depressed," and that his pain was "usually associated with activity, but it can come on spontaneously as well." He reported using a cane, which he tried not to use at home, "but does need to use it out in the community." Dr. Glynn did not report any history of numbness or tingling. (EX-8, p. 4).

[12] Upon physical examination of Claimant, Dr. Glynn noted Claimant exhibited a "very slow movement pattern with virtually all activity. He has a lot of facial grimacing." Dr. Glynn was unable to find repeatable tenderness over the "very same anatomical spot" of Claimant's right shoulder, which was reportedly painful. Dr. Glynn noted Dr. Morse found asymmetrical reflexes; however, Dr. Glynn found symmetrical reflexes. On muscle testing, Claimant exhibited "giveway weakness." (EX-8, p. 5).

of psychological exaggeration and somatization. He opined that there was no physical reason why Claimant could not return to unrestricted work. He also opined his recommendation for Claimant to return to work was generally consistent with the opinions of Drs. Katz and Applebaum, who opined that Claimant could return to work. He noted cervical abnormalities seen before and after Claimant's job injury would not change his opinion that Claimant could return to work without restrictions. (Tr. 484-487, 517-518, 532-533).

On cross-examination, Dr. Glynn indicated he is not qualified to determine a difference of psychological opinions;[13] however, if psychologists disagreed over the necessity of a pain clinic, he opined "it's very improbable that it would be helpful" from a physical standpoint. (Tr. 499-507). He would not recommend an arthogram or facet blocks, which would be unnecessary because Claimant has not established an underlying physical problem. (Tr. 525-528).

Steve Arcenaux

Mr. Arcenaux is employed by Carrier as a U.S. Gulf Regional Claims Director. He supervised claims examiner Kelly, and became actively involved with Claimant's file after Ms. Kelly ended her employment with Carrier. He acknowledged Claimant's choice of physician form in favor of Dr. Vogel that was received by his office on August 31, 2001. Although the form omitted Claimant's date of birth, it would not be problematic for Carrier's claims managers. He was unaware of any reason why Carrier did not reinstate Claimant's benefits after Dr. Applebaum recommended Claimant should not return to work until the completion of a myelogram and post-myelogram CT scan. (Tr. 544-560; CX-12, p. 53; CX-14, p. 21).

[13] Dr. Glynn reported Dr. Phillips "raised the question of possible 'conversion reaction.' I don't think that is likely to be the explanation here. It did not appear to be offered by Dr. Morse, who is a psychiatrist." (EX-8, p. 6).

The Medical Evidence

Touro Infirmary Medical Records

On February 25, 2001, Claimant was diagnosed with "musculoskeletal pain [in the] neck/low back."[14] He was prescribed Vicodin and Ibuprofen. Radiological tests of Claimant's cervical area revealed no fracture or subluxation. Soft tissues appeared within normal limits. Lumbar X-rays revealed no evidence of spondylolisthesis or spondylolysis. Disc spaces were well maintained. Facet joints appeared normal. X-rays of the pelvis revealed no evidence of fracture or hip dislocation. In a "disposition form," Claimant's disability status was not indicated, but it was noted Claimant was to follow-up with "Dr. Patterson." (CX-3, pp. 6-9).

On February 28, 2001, Claimant followed-up for chief complaints of neck, back and leg pain. His blood pressure was 136 over 90, and he was ambulating slowly. Physical examination revealed Claimant was tender to touch in the cervical, thoracic, lumbar areas and in his right leg. Claimant was diagnosed with cervical, lumbar and thoracic strain. In a disposition form, Claimant was unable to work through March 5, 2001, when he was to be reevaluated. He was prescribed physical therapy and exercises for cervical, thoracic and lumbar range of motion. His medications were continued, but Flexeril was added. (CX-3, pp. 3-5).

On August 27, 2001, Claimant underwent a lumbar spine X-ray after reporting lower back pain due to a February 25, 2001 accident. His lumbar series was unchanged from February 25, 2001. On August 28, 2001, Claimant was referred to Dr. Vogel, "patient's own M.D.," as needed. Claimant was prescribed Flexeril and Vicodin for muscle spasm and pain, respectively. He was instructed not to drive, operate dangerous machinery, climb ladders or consume alcoholic beverages while under the influence of the medications. No disposition form indicating Claimant's disability status accompanied the August 27, 2001 visit. (CX-3, pp. 1-2).

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[14] On the date of injury, a police report indicates Claimant was operating a crane when "the arm of the crane dropped down suddenly," which caused the "cabin of the crane where he was sitting to shake abruptly. [Claimant] stated that he suffered head, neck, and back injuries from the incident." An ambulance was dispatched to transport Claimant to Touro. (CX-2, p. 4).

Ralph Peyton Katz, M.D.

On October 23, 2002, Dr. Katz, a board-certified orthopedic surgeon, was deposed by the parties. He treated Claimant for complaints of neck and back pain. (EX-14, pp. 5-6, 89-93).

On March 5, 2001, Dr. Katz initially treated Claimant, who reported a February 25, 2001 injury in which the boom of a crane he was operating "fell with a load jerking the cab and himself inside. At the time he was shaken up, states that he had neck and back pain mainly on the right side." Claimant complained of continuing pain despite the use of medications which were prescribed and administered by emergency room physicians. Claimant indicated his cervical pain was greater than his back pain and that it was painful to move his neck from side to side and up and down. His cervical pain ran from the lower neck to the area between his ears, where he complained of headaches. His pain was occasionally sharp, but sometimes "dull and achy" with stiffness. Periodically, the pain would become severe. Occasionally, Claimant experienced numbness into the fingers. Claimant was complaining of pain in the central portion of his back without radiation into his legs or buttocks. His pain was "worse with sitting, sometimes standing, better with rest." (EX-7, p. 1; EX-14, pp. 6-8).

On physical examination, Claimant was in no acute distress. He exhibited facial grimacing with complaints of pain upon sitting. While standing, Claimant exhibited "normal contouring of the cervical spine. He had complaints of stiffness with motion, but when distracting [him], he was able to move his neck in a very fluid type motion . . . without any difficulties." Upon palpation, Claimant reported pain without palpable spasms. Claimant's motor strength was normal. (EX-7, pp. 2-3; EX-14, pp. 8-11).

Claimant exhibited "breakaway weakness," which is a non-organic manifestation or an "exaggerated response to pain" that might be associated with malingering. Dr. Katz opined physical examination of Claimant's neck and lumbar spine was normal except for subjective complaints of pain. There were no objective signs of physical problems. Claimant's radiological results were consistent with age-related changes appropriate for Claimant's age. Dr. Katz's assessment included no evidence of radiculopathy or myelopathy. Dr. Katz recommended conservative treatment, including steroids, anti-inflammatory medications, a one-week program of physical therapy and an eventual release to return to work. (EX-7, pp. 2-3; EX-14, pp. 11-15).

Dr. Katz noted that he would give Claimant the "benefit of the doubt and a week off of work until I see him again next Monday," which is a phrase he uses upon treating "[s]omebody who I have a strong feeling that there's nothing wrong with this patient, he has a lot of the {Waddell} type findings which are inconsistencies on the physical exam and pain out of proportion to his examination." Dr. Katz expected Claimant to be capable of returning to work without restrictions after one week. (EX-7, pp. 2-3; EX-14, pp. 15-16).

On March 12, 2001, Dr. Katz followed-up with Claimant, who was using a cane. Claimant reported complaints of ongoing cervical and lumbar pain. He was "experiencing now what he perceives is some pain into the right hand and into the right leg." He attended physical therapy which he reported was painful and not helpful. Dr. Katz described Claimant's use of a walking cane as "very unusual" and a "significant amount of symptom magnification" because Claimant was in no acute distress one week earlier and had since undergone physical therapy. Further, there were "significant subjective complaints of pain with just light stroking of the skin," but no palpable spasms. Claimant reported pain with motion, but "gave very poor effort." His motor strength, sensation, pulse and reflexes were normal. Claimant could flex his back 90 degrees sitting, but only ten degrees standing, which were inconsistent findings. Dr. Katz recommended MRIs of Claimant's back and neck. (EX-7, pp. 5-6; EX-14, pp. 16-22).

On March 19, 2001, Dr. Katz followed-up again with Claimant, who underwent the recommended MRIs. Claimant's ongoing neck and back pain had not improved since the last visit. Claimant continued using a cane, but was in no acute distress.[15] His MRIs were "both normal." Dr. Katz informed Claimant that his examination was normal except for subjective complaints. He recommended one week of conservative treatment and prescribed Soma, Vicodin and Mobic. He injected Claimant with Toradol and prescribed heat and ice modalities. He provided Claimant with a release to return to work without restrictions on the following Monday. Claimant was to follow-up in one month. (EX-7, pp. 8-9; EX-14, pp. 22-24).

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[15] Dr. Katz reported that Claimant did not appear to be in acute distress "walking down the hallway and going to the chair," nor did he appear to be in pain on motor testing. However, he "complained of pain verbally." (CX-7, p. 8).

On April 16, 2001, Claimant returned for a follow-up. He reported not returning to work due to continuing and ongoing pain, which hurt "from his shoulders all the way down into his back and both legs." Claimant continued using a cane. Physical examination revealed no abnormal findings. Dr. Katz could discern no palpable spasms. Claimant again exhibited exaggerated symptoms and inconsistent complaints.[16] Dr. Katz concluded Claimant experienced subjective complaints of muscular pain without physical abnormalities, and recommended Claimant should return to work without restrictions. (EX-7, pp. 10-11; EX-14, pp. 30-31).

On June 11, 2001, Claimant returned, complaining of ongoing and severe pain across his "lower back," through his buttocks "into the area of his right knee but not below the knee. No numbness or tingling in the feet. Complaining of back pain all the way up into his neck and shoulders."[17] He continued walking with a cane.[18] Physical examination was normal. Dr. Katz recommended Claimant should return to unrestricted work. Claimant was advised to follow-up as needed. (EX-7, p. 13; EX-14, pp. 31-32, 38).

On September 6, 2001, Claimant complained of "persistent pain across the back, left groin for three to four days." Claimant reported that he attempted to return to work in July 2001, but "couldn't take it anymore." He experienced pain in his left thigh, but not the right. No numbness or tingling in the feet was reported. Claimant was "verbalizing pain, complaining of pain, grimacing in the face, ambulating slowly [and] holding his back." In the examining room, Claimant was "sitting in the chair and after a while, I noticed him and he did not have any complaints of pain. But once I walked into the

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[16] Dr. Katz reported Claimant had "breakaway weakness in the upper and lower extremity with grimacing and sighing stating that it hurt with manual testing of motor strength in the upper and lower extremity." Claimant gave a "very poor effort with heel and toe walking, but was able to do so." (EX-7, p. 10).

[17] Dr. Katz reported "palpable tenderness everywhere;" however, Dr. Katz was unable to perceive or palpate spasm upon physical examination. (EX-7, p. 13).

[18] Claimant used a cane to ambulate and walked slowly; however, "in asking him to stand up and sit to the table, he does this appropriately." (EX-7, p. 13).

room, he started grimacing and having pain." Physical examination revealed no abnormalities. X-rays revealed insignificant findings. Dr. Katz reported, "clinically, the patient has pain out of proportion to any physical findings." (EX-7, pp. 14-15; EX-14, pp. 38-43).

On November 8, 2001, Dr. Katz prepared a letter in response to Carrier's request for his evaluation of the opinions rendered by Drs. Aprill and Vogel. Dr. Katz disagreed with Dr. Vogel's diagnosis of suspected cervical and lumbar segmental instability, which is a radiographic diagnosis supported by "flexion/extension films which have to show changes in position of the facet joints in the intervertebral bodies with respect to one another." Dr. Katz did not observe such films. Dr. Katz would not recommend an arthrogram or block, which would be unwarranted to continue Claimant's conservative treatment for his subjective complaints of pain. (EX-7, pp. 17-18; EX-14, pp. 43-44).

On December 4, 2001, Dr. Katz prepared a letter in response to Carrier's request for his opinion of Dr. Applebaum's recommendation for a physiatrist. Dr. Katz did not disagree with that recommendation, and he recommended a physiatrist, Dr. Clifford Ameduri. (EX-7, p. 19; EX-9, p. 8; EX-14, pp. 46-47).

On March 6, 2002, Claimant returned for a follow-up visit, reporting subjective complaints of ongoing neck and back pain without underlying objective manifestations. He also reported "numbness and tingling in the top of his foot, pain in the right (sic) now and as well as the back. Described numbness and tingling into his leg." Pain extended into his right shoulder and upper arm; however, there were no complaints of pain, numbness, weakness or tingling into the hands. Pain was worse with standing. (EX-7, pp. 20-21; EX-14, pp. 47-51).

Dr. Katz again concluded Claimant's symptoms were out of proportion to and inconsistent with normal physical findings on examination.[19] No atrophy was present, which would be inconsistent with Claimant's history of complaints and physical inactivity. Likewise, Dr. Katz found no symptoms of radiculopathy or myelopathy. He had "nothing else to offer [Claimant]," who was fit to return to unrestricted work. Dr.

[19] Dr. Katz reported Claimant "guards and grimaces with light touch and stroking" and that Claimant "complains of severe pain by just standing and putting my hand on his head." (EX-7, p. 21).

Katz has not seen Claimant since March 6, 2002. (EX-7, pp. 20-21; EX-14, p. 51).

During the entirety of his treatment of Claimant, Dr. Katz indicated Claimant reported no new intervening incidents or accidents which would have caused his complaints. Physical examinations were normal with no objective findings. Claimant consistently reported inconsistent complaints concurrent with positive Waddell signs. Claimant consistently reported complaints which were out of proportion with findings on physical examination. Dr. Katz does not know who selected him as Claimant's treating physician, but assumed he was Claimant's treating physician because Claimant elected to return for treatment and comply with his recommendations for diagnostic testing. Dr. Katz did not recall nor did he report Claimant's dissatisfaction with treatment or his desire to discontinue treatment with Dr. Katz. (EX-14, pp. 52-57).

From the time that Dr. Katz first released Claimant to return to work until his last evaluation of Claimant, there were no findings which would change his opinion that Claimant could return to unrestricted work. Rather, MRI studies supported his conclusion that Claimant could return to work. Absent a subsequent incident or injury since March 2002, Dr. Katz opined Claimant could return to his prior occupation without restrictions. From a physical standpoint, Dr. Katz would not object to available jobs identified by vocational expert Favoloro which are purportedly within Claimant's physical restrictions and limitations because Dr. Katz opined Claimant could return to any employment, assuming Claimant had the intellectual capacity to perform the jobs. (EX-14, pp. 57-60).

On cross-examination, Dr. Katz stated some of his records indicate Carrier referred Claimant to treat with him. Dr. Katz did not initially recommend Claimant to a physiatrist, but agreed with Dr. Applebaum's recommendation that Claimant see a physiatrist. Carrier did not recommend a physiatrist. Rather, Dr. Katz recommended a physiatrist with whom he is familiar. (EX-14, pp. 61-64).

Dr. Katz would not agree with the opinions of Drs. Applebaum, Kewalramani and Morse that Claimant should remain off-work for a period of time. He concluded Claimant "has a normal exam; he has symptom magnification and has inconsistencies on his examination consistent with malingering." Dr. Katz did not find symptoms of Claimant's depression, nor was he aware Claimant was examined by a psychiatrist who found

symptoms of depression. He agreed there are occasions in which "people have psychiatric problems that can lead to manifest themselves into other physical problems." (EX-14, pp. 64-68).

Dr. Katz noted Claimant's one-week period of physical therapy was a combination of manual physical therapy and self-directed exercises. Following such physical therapy, patients are "not likely" to experience increased symptoms other than "a short period of time where the next day they'll feel a little sore. But after that, it usually resolves." Dr. Katz indicated he prescribed a variety of non-narcotic muscle relaxants, pain medications and anti-inflammatory medications "to try to give [Claimant] some relief to see if something would make him feel better." Claimant reported some temporary relief from injections. Dr. Katz admitted he did not review any flexion and extension films to determine the presence of instability, nor could he recall whether such films were provided to him for review. (EX-14, pp. 68-78).

On re-direct examination, Dr. Katz indicated his office records generally identify the party responsible for payment regardless of whether or not an employer or carrier selects him as a treating physician. He indicated Claimant reported temporary relief from injections on only one visit, namely the visit on April 16, 2001. Otherwise, Claimant reported no relief from medications. Dr. Katz continued prescribing medications to give Claimant the "benefit of the doubt." He changed Claimant's medications throughout treatment because various medications appeared ineffective. (EX-14, pp. 78-80).

Dr. Katz indicated his reports were generally consistent with Dr. Applebaum's reports and recommendations, except for Dr. Applebaum's restrictions against returning to work pending further testing and Dr. Applebaum's release of Claimant to return to moderate duty work with a restriction against lifting more than 50 pounds. (EX-14, pp. 80-81).

Dr. Katz indicated Dr. Glynn's August 22, 2002 and May 16, 2002 reports would not change his opinion that Claimant may return to unrestricted work. He noted that the August 22, 2002 report indicated Claimant displayed symptom magnification and self-limiting behavior. Dr. Katz stated that a recommendation for a pain psychology evaluation is beyond his area of expertise. (EX-8, pp. 3-6; EX-14, pp. 81-86).

Kurt E. Vogel, M.D.

On July 2, 2001, Dr. Vogel evaluated Claimant for cervical pain, bilateral arm pain, lumbosacral pain and bilateral leg pain at Claimant's attorney's request.[20] Claimant reported a history of injury while operating a crane. "[A]s the boom fell and stopped, [Claimant] was thrown about by the action of the boom falling. He was dazed momentarily and noted immediate headaches, cervical and lumbosacral pain." Claimant had not yet returned to his prior occupation. (CX-6, p. 8).

Upon physical examination by Dr. Vogel, Claimant was in no acute distress. His use of a cane was not reported. Lumbosacral examination revealed a "moderate degree of muscle spasm bilaterally" and "lower lumbar facet pain bilaterally." Cervical examination revealed a "mild degree of muscle spasm bilaterally" with bilateral brachial plexus tenderness. Lower cervical facet pain, bilaterally, was reported. The remainder of the neurological examination of the motor, sensory and cerebellar systems was considered within normal limits. An MRI was requested. Dr. Vogel diagnosed a "herniated lumbar disc versus instability, suspected" and a "herniated cervical disc versus segmental instability, suspected," which were related to his job injury. Ongoing and continuing conservative care and physical therapy were recommended. (CX-6, pp. 8-9).

On September 11, 2001, Claimant returned for reevaluation. Physical examination revealed moderate muscle spasm bilaterally. Sensory examination revealed no abnormality. Lower lumbar facet pain was reported bilaterally. Dr. Vogel did not report whether Claimant used a cane. He agreed with the reports of cervical and lumbar MRI which were received.[21] Dr. Vogel recommended conservative treatment. He recommended an FCE when Claimant reached maximum medical improvement. Dr. Vogel would defer to a vocational specialist "as to what occupation he can return based on the [FCE] findings." Dr. Vogel disabled Claimant from "gainful employment pending [evaluation] and [diagnosis]" and prescribed Neurontin. Claimant agreed to return on an as-needed

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[20] This was a follow-up visit following an earlier visit which is not included with Dr. Vogel's records. (CX-6, p. 8).

[21] Dr. Vogel did not identify the MRI results, but he ostensibly reviewed the March 15, 2001 MRI results, which were generally reported as "normal." (CX-4; EX-10, pp. 1-2).

basis. Dr. Vogel did not indicate what his diagnosis was on September 11, 2001. (CX-6, p. 5).

On October 22, 2001, Claimant returned for reevaluation of his ongoing complaints of lumbosacral and bilateral leg pain and mild cervical pain with pain in the right arm. Dr. Vogel agreed with a report of Claimant's myelogram and post-myelogram CT scans, "except for a small central disc protrusion present at C4-5 and C5-6."[22] No change or improvement in Claimant's lumbosacral area was reported. Cervical examination revealed a mild degree of limitation of motion in all directions and a mild degree of muscle spasm bilaterally. Sensory examination revealed no abnormality. Dr. Vogel did not report whether Claimant used a cane. Dr. Vogel diagnosed "segmental cervical instability, suspected" and "segmental lumbar instability, suspected" and recommended an outpatient cervical and lumbar facet arthrogram and block. (CX-6, p. 4).

On March 4, 2002, Claimant last treated with Dr. Vogel.[23] He reported ongoing cervical and right upper arm pain plus paresthesia of the right hand. Claimant also reported severe lumbosacral and right leg pain." Claimant had not yet returned to work. (CX-6, p. 1).

Neurological examination of the lumbosacral area revealed a moderate degree of limitation of motion in all directions with a mild degree of muscle spasm bilaterally. The motor examination was limited by pain. Cervical examination revealed a mild degree of limitation of motion in all directions with mild muscle spasm bilaterally. Sensory examination revealed no abnormality. Lower right cervical facet pain was reported. Dr. Vogel's recommendations were unchanged from his October 22, 2001 report. Although Dr. Vogel noted Claimant was expected to return following a lumbar facet arthrogram and block, there is no indication in Dr. Vogel's records that Claimant returned to his office for further treatment. Id.

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[22] On November 9, 2001, Dr. Vogel reviewed additional MRI reports and prepared a letter to Ms. Kelly in which he no longer suspected Claimant had a herniated cervical disc. (CX-6, p. 3; CX-12, p. 53).

[23] In his March 4, 2002 report, Dr. Vogel reported Claimant was "walking with a cane." This was the first and only time Dr. Vogel reported Claimant's use of a cane. (CX-6, p. 1).

Robert Applebaum, M.D.

On October 21, 2002, Dr. Applebaum, who is a board-certified neurosurgeon, was deposed by the parties. He examined Claimant twice at Employer/Carrier's request. (EX-13, pp. 5-6, 20-23, 37-38).

On October 1, 2001, Dr. Applebaum's examination of Claimant's neck revealed a normal range of motion with a minimal degree of rigidity.[24] Examination of the low back revealed minimal limitation of motion, no muscle spasm and a normal curvature of the spine. No abnormal reflexes were noted. Claimant "had a significant amount of pain behavior with a lot of moaning and groaning and gasping during the course of the exam." Claimant's cervical MRI indicated a clinically insignificant bulging of the C5-6 disc. His lumbar MRI was unremarkable. Dr. Applebaum found no evidence of a disease or damage involving Claimant's spinal cord or nerve roots, but recommended a myelogram of the cervical and lumbar regions followed by CAT scans to "rule out the unlikely possibility of a significant interspinal problem." Dr. Applebaum recommended Claimant should not return to work pending the outcome of the tests. (EX-9, pp. 1-5; EX-13, pp. 9-12).

On November 12, 2001, Dr. Applebaum followed-up with Claimant, who underwent the recommended tests that revealed no evidence of a ruptured disc, nerve root irritation or any other significant abnormality. Claimant complained of pain in his low back and neck with pain in his right shoulder and arm. He experienced headaches, pain in both legs, which was more severe on the right. He complained of weakness in both legs. He also noted "some rare pain in his left shoulder with mild weakness

[24] Claimant reported "he was operating a crane and a boom on the crane fell. The cabin apparently shifted around. [Claimant] does not recall the details of the accident and was questionably rendered unconscious for an unknown period of time. Upon awakening he noted pain in his back and right arm." Claimant reported ongoing neck and back pain, and bilateral leg pain "which was rather vague and diffuse running to his feet." Dr. Applebaum found no atrophy upon motor examination. (EX-9, pp. 3-4). Claimant reported the reason for his visit was a "neck [and] back injury" and that his mother and sister suffered from high blood pressure. Claimant was not reportedly using a cane. (EX-9, p. 1).

and numbness in the left arm and constant pain in his mid back below the shoulder blades." Cervical examination revealed a "moderate to marked amount of pain behavior with a good deal of whining, groaning, moaning and complaints of diffused tenderness to light touch in numerous areas along the spine and neck." No focal spasm was present. Upon motor examination, Dr. Applebaum found no atrophy. (EX-9, p. 7; EX-13, pp. 12-15).

Dr. Applebaum could not explain Claimant's symptoms from a neurological point of view. He did not see any need for further neurological testing or treatment. He did not recommend arthrograms or blocks, which he opined would be of no benefit. He opined Claimant's symptoms were somewhat exaggerated. Claimant was at maximum medical improvement and could return to some form of moderate work with restrictions against prolonged bending or stooping or lifting more than 40 or 50 pounds. Dr. Applebaum recommended a physical medicine pain specialist. After a review of Dr. Glynn's report, Dr. Applebaum's opinions of Claimant's condition remained the same. He did not opine surgery was necessary. (EX-13, pp. 15-20).

On cross-examination, Dr. Applebaum disagreed with Dr. Vogel's diagnosis of suspected spinal instability. With a restriction against lifting more than 40 or 50 pounds, Dr. Applebaum did not opine Claimant could return to longshore work. Dr. Applebaum was unaware of any intervening incidents which would cause a change in Claimant's symptoms between the first and second visits. He opined that Claimant's problem is not neurological and involves no nerve root compression. According to Dr. Applebaum, pain management would be a more appropriate specialty to treat Claimant's complaints. (EX-13, pp. 20-28).

On re-direct examination, Dr. Applebaum agreed with Dr. Glynn's findings of symptom exaggeration. Dr. Applebaum was unconvinced Claimant experienced the pain he reported.[25] (EX-13, pp. 28-30).

[25] On February 24, 2003, Dr. Applebaum reported his opinions based on the review of additional medical records, including: (1) Dr. Watermeier's December 19, 2002 report, (2) Dr. Bunch's report of Claimant's February 6, 2003 FCE, and (3) Dr. Bianchini's report of Claimant's November 4 and 5, 2002 psychological evaluation. Dr. Appplebaum disagreed with Dr. Watermeier's recommendations and diagnosis of a cervical/dorsal/lumbar strain as well as a cervical displacement and lumbar disc syndrome. Dr. Applebaum opined Claimant has no

L.S. Kewalramani, M.D.

On December 11, 2001, Claimant treated at his own request with Dr. Kewalramani, a physical medicine specialist whose credentials are not of record. Claimant complained of cervical pain which intermittently radiated into his right upper extremity and lumbar pain which intermittently radiated into his right lower extremity. He reported an injury sustained while operating a crane "20 feet off the ground." The "boom fell and he was jerked around inside the cab. He experienced severe headache with pain and discomfort in [the] cervical and lumbar region[s]." (CX-5, p. 7).

Claimant reported a history of returning to work as a crane operator after cervical and lumbar injuries sustained in a car accident in 1998 or 1999 resolved within four to six months. (CX-5, p. 8). Claimant indicated he attempted to return to work in July or August 2001, but "going up the ladder to reach the cab of his crane often tended to increase the pain. He experienced increased cervical and lumbar pain and was advised to seek treatment two or three weeks after his return to work. Id.

Claimant complained of deep-seated cervical pain which radiated intermittently into the right upper extremity and which was aggravated by head and neck motions. The pain was greater with motions to the right. Lumbar pain was also reportedly deep-seated with constant aching, pain and stiffness. The pain was aggravated by sitting in one position for any length of time, standing, bending and stooping. It radiated bilaterally more on the right than left. On physical examination, it was

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disease or damage involving the spinal cord or nerve roots. (EX-9, pp. 9-10).

Dr. Applebaum found the FCE was "not very revealing other than the fact that [Claimant] showed poor validity and Dr. Bunch was unable to actually determine his physical level of performance or his ability to return to work due to non-organic illness behavior." Dr. Applebaum noted Dr. Bianchini concluded there are no psychological impairments preventing Claimant from returning to work and that a return to work would be therapeutic for Claimant. Dr. Applebaum would defer to Dr. Bianchini's psychological opinion; however, he noted, "it would be my opinion that there is no neurological impairment that would prevent [Claimant] from returning to work." Id.

noted that Claimant ambulated with a cane. He was able to walk with a "stiff person gait," favoring "his right lower extremity." (CX-5, p. 8).

Cervical examination revealed a partial loss of the lordotic curve, increased tissue turgescence and diffuse tenderness in the C-4, C-5 and C-6 area. Cervical motion was guarded. Dorsal examination revealed mild "scoliosis with convexity towards the left, [p]reservation of lumbar lordosis, mild spasm of paraspinal muscles," and diffuse lumbar tenderness. No specific sensory deficit was noted along the upper and lower extremities. There was "no evidence of muscle atrophy of any major muscle groups along upper extremities." (CX-5, p. 9).

Dr. Kewalramani's impression included: (1) "cervical musculoligamentous pain syndrome supported by findings of a partial loss of the lordotic curve, increased tissue tugescence, diffuse tenderness, restricted cervical motions and increased pain on motions against resistance; (2) "rule out cervical disc dysfunction and/or facet arthropathy," supported by a history of trauma, chronic duration of pain, intermittent radiation of pain along right upper extremity and complaints of increased pain with physical activities; (3) chronic musculoligamentous pain syndrome, supprted by findings of mild dorsolumbar scoliosis, increased tissue turgescence, mild spasm of paraspinal muscles, diffuse lumbar tenderness, restricted lumbar motion and complaints of increased pain and discomfort on pelvic rolling; and (4) lumbar mechanical dysfunction, supported by findings of a history of trauma, duration of pain, age and body build of Claimant, an inability to reverse the spinal curvature, complaints of increased pain to spinal percussion, pelvic rolling and performance of the Farbere test. (CX-5, p. 10).

Dr. Kewalramani's recommendations included: (1) Claimant should help obtain medical records and imaging studies from Touro and Drs. Katz and Vogel for Dr. Kewalramani's review; (2) use a moist heating pack; (3) use theragesic cream; (4) a prescription for Celebrex for one week; (5) a prescription for Xanax for two weeks; (6) a prescription for 30 tabs of Lorcet, to be used once every 8 to 12 hours for severe pain; (7) return for a follow-up two weeks later; (8) exercise caution with lifting, pushing, pulling and avoid pivoting; and (9) further recommendations pending a review of Claimant's medical records and X-rays. (CX-5, p. 10).

On December 20, 2001, Dr. Kewalramani evaluated films brought by Claimant from Diagnostic Imaging Services. In Claimant's cervical area, Dr. Kewalramani found no evidence of cord compression along the cervical spine. Cervical root sleeves were bilaterally symmetrical and satisfactorily filled. The "anteroposterior diameter of the canal appear[ed] to be satisfactory." The films revealed a straightening of the lordotic curve and bulging discs of 1 to 2 mm. at C4-5 and C5-6. (CX-5, pp. 11-12).

In Claimant's lumbar region, there was "no evidence of thecal sac compression at L3-4, L4-5 or L5-S1 levels." Root sleeves were "adequately filled and symmetrical." The "anteroposterior diameter of the lumbar canal [was] satisfactory." No evidence of bulging discs was reported. (CX-5, pp. 11, 13; EX-10).

On December 27, 2001, Claimant returned for follow-up treatment. Claimant reported only temporary decrease in pain and discomfort from the use of medications. He continued to complain of the same symptoms. He was able to walk without an obvious limp, but continued to use a cane. When he was asked to walk on his toes and on his heels, there was an "antalgic element and patient was noted to favor [his] right lower extremity." Dr. Kewalramani reported no diagnosis, but noted Claimant was symptomatic. No muscle spasm was reported in the cervical area; however, mild spasm continued to be reported in the paraspinal muscles in the lumbar area. Dr. Kewalrami's recommendations included: (1) cervical EMG into right upper extremity, (2) lumbar EMG into the right lower extremity, (3) continued use of a heating pad; and (4) continued use of theragesic cream. Claimant's medications were continued for three weeks, when Claimant was to return for a follow-up visit. (CX-5, pp. 5-6).

On January 17, 2002, Claimant returned for follow-up treatment, complaining of the same symptoms which persisted. He continued using a cane. Clinically, Claimant was "about the same." A loss of the lordotic curve in the cervical region was again reported, but no muscle spasms were reported in the cervical or lumbar areas. Dr. Kewalramani reported, "With medications and home therapy, I have not been able to help him. [Claimant] was advised to see his neurosurgeon." Dr. Kewalramani did not report a diagnosis, but noted Claimant remained symptomatic. Claimant's medications were continued for another three weeks. He was advised to return to Dr. Vogel. (CX-5, p. 4).

On January 15, 2003, Claimant returned for a follow-up visit at which he reported continuing and ongoing cervical and lumbar complaints with radiation on the right. A loss of the lordotic curve in the cervical region was again reported without findings of muscle spasms in the cervical or lumbar areas. Claimant continued using a cane. Dr. Kewalramani noted Claimant was being treated by Dr. Watermeier, who advised Claimant to seek treatment in an inpatient pain clinic. Dr. Kewalramani did not report a diagnosis, but noted Claimant remained symptomatic. He opined a pain clinic was "a good choice, and I advised [Claimant] to consider that route." Dr. Kewalramani's recommendations included: (1) Claimant should continue treating with Dr. Watermeier; (2) Claimant was advised to consider the pain clinic; and (3) Claimant was not given a return appointment. (CX-5, pp. 1-2).

The Louisiana Clinic Medical Records

On March 5, 2002, Dr. Stuart I. Phillips, whose credentials are not of record, reported the results of his orthopedic evaluation of Claimant at Claimant's attorney's request. Claimant reported an injury from being "jerked around" while operating a crane. Following the injury, Claimant developed "cervical, dorsal and lumbar pain." (CX-7, pp. 5).

On physical examination, Claimant weighed 270 pounds and complained of severe low back pain radiating into the right lower extremity, "aching in character, associated with numbness, and the symptoms have remained the same." He reported tingling in his right foot, weakness in both legs and pain with coughing and sneezing. His condition was "related to activity and relieved by rest." Claimant also complained of severe cervical discomfort radiating between the shoulder blades and both shoulders, pain in both arms and paresthesias in both arms, weakness in both hands, numbness, tingling, headaches and dizziness. He experienced "right knee pain with giving away. He reported symptoms of depression for which he was taking medicine. He attained a high school education and reported a "family history of high blood pressure." (CX-7, pp. 5-6).

Dr. Phillips reported, "I have no medical record from other physicians and certainly this would help in making a diagnosis." He noted Claimant was involved in a 1999 car accident, but no medical records were provided. Physical examination revealed limited range of cervical and lumbar motion. Dr. Phillips was unsure whether Claimant experienced muscle spasm in his neck

"because of [Claimant's] great anxiety." Sensation was difficult to determine because Claimant was "very anxious." Mild tenderness and spasm were present upon dorsal exam. Some left paraspinal muscle spasm was present and Claimant exhibited a "generalized list to the left." Claimant's calf and thigh sizes were equal. (CX-7, pp. 5-6).

X-rays on March 5, 2002 revealed a flattening of the cervical curve and kyphosis in the upper thoracic spine. No lumbar instability, spondylolisthesis or spondylosis, fractures or dislocations were noted, although "early degenerative change at L3-4" was reported. Claimant's pelvic X-ray revealed no acute fractures or dislocations. Claimant brought a copy of a myelogram and post-myelogram CT scan of the entire spine, which were "interpreted as normal."[26] (CX-7, p. 7).

Dr. Phillips concluded Claimant sustained an injury, but could not determine the exact etiology of the problem "[o]n the basis of a single evaluation," noting again he did not possess all of Claimant's medical records. According to Dr. Phillips, "Offhand I would say that one of the things we should think about is a conversion reaction," which "should be made by a psychiatrist." Dr. Phillips suggested a referral to the pain clinic, which could determine "whether or not they think any treatment is available." If Claimant was not experiencing a conversion reaction, Dr. Phillips opined the pain clinic might "sedate him enough so that we could do a thorough exam." He thought an EMG of the upper and lower extremities would be helpful. Claimant was not a candidate for surgery or invasive testing. Dr. Phillips would treat Claimant for any orthopedic problem identified by the pain clinic. (CX-7, p. 7).

Dr. Phillips prepared an "addendum" in which he reported, "I have reviewed the MRI films that were sent to me, but I do not have a copy of the reports."[27] The results of the MRI indicated a herniated disc at L4-5 which was "large enough to deform the thecal sac." He sought to review the radiologist's reports before adding any further opinions. (CX-7, p. 8).

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[26] Dr. Phillips did not identify which myelogram and post-myelogram CT scan were reviewed. (CX-7, p. 7).

[27] Dr. Phillips did not identify which MRI films he reviewed, nor did he report whether the additional records he desired to review were provided to him. (CX-7, p. 8).

On May 7, 2002, Claimant reported no change since his prior treatment with Dr. Phillips. Physical examination of Claimant's cervical area revealed bilateral paravertebral muscle spasm in the paraspinal muscles. Neurological examination revealed normal reflexes and good muscle strength. Sensations were intact in both upper extremities with no evidence of nerve entrapment. Physical examination of Claimant's lumbar region revealed "marked mechanical signs," muscle spasm and tenderness in the lumbar paravertebral muscles. Limited range of motion was reported with pain at the extremes of motion. (CX-7, p. 4).

Dr. Phillips noted Claimant had an appointment with the pain clinic and was "very interested to see what that will show." Hydrocodone and Soma were prescribed "until we get more information from the pain clinic. At that time, we will make up our mind as to whether or not further diagnostic procedures are indicated." Claimant was diagnosed with "lumbar disc displacement, cervical [and] thoracic sprain/strain." He was temporarily disabled from work and directed to return for follow-up treatment after treating with the pain clinic." Id.

On August 6, 2002, Claimant returned to Dr. Phillips for a follow-up visit after Claimant's examination by Dr. Morse at the pain clinic. Dr. Phillips "totally concurred" with Dr. Morse's report and concluded Claimant would benefit from an inpatient program. He indicated Claimant was unable to "ever get well without intensive pain therapy." (CX-7, p. 3).

On physical examination, Dr. Phillips reported bilateral muscle spasm in the cervical paraspinal muscles. Neurological examination revealed normal reflexes and good muscle strength. Sensation was intact in both upper extremities with no evidence of nerve entrapment. Lumbar examination revealed muscle spasm and tenderness in the paravertebral muscles, with limited motion and pain on the extremes of motion. Results from neurological testing were within normal limits with no pathological reflexes. Claimant was diagnosed with "lumbar disc displacement, sprain neck, sprain thoracic region." Claimant's disability status was "total, permanent." Id.

On September 19, 2002, Dr. Watermeier, whose credentials are not of record, treated Claimant for a follow-up visit after it was noted Dr. Phillips would be retiring. Claimant reported continuing and ongoing symptoms in his cervical, dorsal, and

lumbar areas.[28] He was "depressed and anxious about his health status." His "subjective complaints in the cervical/dorsal/lumbar spine include moderate to severe pain increased with activity, stiffness, and radiating pain into the upper and lower extremity." He walked "with a stiff gate and uses a cane in the left hand." (CX-7, p. 1).

Cervical examination revealed tenderness in the lower cervical spine and mild to moderate muscle spasm in the right trapezius. Neurological examination revealed no sensory, motor or reflex abnormalities. There was "no atrophy, and the vascular status is equal and active bilaterally." Lumbar examination revealed no gross abnormality over the painful area. Moderate tenderness in the lower lumbar spine was reported with mild to moderate muscle spasm. Loss of lumbar motion was reported. Neurological examination revealed no sensory, motor or reflex abnormalities. There was "no calf atrophy, and the peripheral pulses were equal and present." X-rays taken on September 19, 2002, indicated mild spondylosis. Cervical X-rays revealed a flattening of the cervical curve and spondylosis at C5-6. (CX-7, pp. 1-2).

Dr. Watermeier diagnosed "cervical/dorsal/lumbar strain, cervical disc displacement, lumbar disc syndrome and shoulder bursitis." He recommended inpatient pain management. Dr. Watermeier recommended electromyography and a nerve conduction study (an EMG/NCS). He opined Claimant was depressed and needed psychiatric evaluation and treatment. Claimant's disability status was designated as "total permanent." (CX-7, p. 2).

Nathanael Mullener, Ph.D.

On October 17, 2002, Dr. Mullener, a clinical psychologist whose credentials are not of record, reported his October 15, 2002 evaluation of Claimant at Claimant's counsel's request. Claimant reported ongoing pain related to a job injury while operating a crane "when the boom fell, spinning the cab around. As a result, he injured his back." Claimant complained of ongoing and continuous pain in his "back, arms and legs, especially on his right side." He reported taking Vicodin and Soma for pain and Elavil, an anti-depressant which helps with a sleep problem he has due to pain." (CX-22, p. 1).

[28] According to Dr. Watermeier, Claimant reported continuous and ongoing symptoms since "a boom from a crane fell onto [Claimant]." (CX-7, p. 1).

Claimant reported an inability to "sit, stand, or lie down for prolonged periods due to pain." He could dress himself but could not put on his socks. He could bathe himself but needed help exiting the bathtub. He was unable to perform much housekeeping due to pain. He presented as a "moderately obese man who walks slowly with a cane. He got up once or twice during the interview because he was uncomfortable from sitting too long." During psychological testing, Claimant "put forth very good effort and seemed to want to do well." Id.

Claimant's results on IQ testing revealed a "Verbal I.Q. of 69, a Performance I.Q. of 77, and a Full Scale I.Q. of 70, placing [Claimant] at the low end of the borderline range of intellectual ability." He showed "a relative strength in manipulation of abstract symbols and mental operations. Here he reached the average range." Dr. Mullener reported, "In administering the test, I was not aware of any factors that might have negatively affected the validity of the results and therefore feel the present findings are an accurate reflection of his intellectual ability." Dr. Mullener noted Claimant functions "at the third grade level in reading, the second grade level in spelling, and the seventh grade in arithmetic. (CX-22, p. 2).

Upon mental status examination, Dr. Mullener "did not note any disorganization in [Claimant's] thinking process nor the presence of any significant distortions of reality or delusions." Claimant's "reasoning and judgment seemed adequate." Dr. Mullener did not observe any problems with Claimant's memory, although Claimant exhibited "signs of clinical depression." Claimant's energy level appeared diminished, and he "appeared dysphonic in mood." Claimant reported "suicidal thoughts and feels like a failure." He also reported problems with concentration. He reported an adverse effect on his mood, his attitude towards life, and his feelings about himself as an effective husband and father related to pain from his job injury. Dr. Mullener did not otherwise report any conclusions or recommendations. Id.

Albert P. Koy, M.D.

On February 25, 2003, Dr. Koy, a psychiatrist, psychotherapist and psychoanalyst whose credentials are not of record, reported his psychiatric evaluation of Claimant at Claimant's counsel's request. Claimant's chief complaints were depression and a lack of energy. Dr. Koy reported a difference of psychological opinion over whether Claimant was malingering.

He opined Claimant was not malingering, but did not report the basis of his conclusion. (CX-10, p. 1).

Claimant reported an injury sustained while operating a crane "'50 feet above the ground' when suddenly some cables slipped and the arm of the crane went crashing down, jerking [Claimant] in several directions." Claimant could not recall losing consciousness, but was "scared to death seeing himself being thrown out of the caboose and falling to his death." The first thing Claimant recalled was a "very intense headache that lasted for a long time." Claimant, who ambulated using a cane, reported a 70-pound weight gain since his job injury which he related to "increasing frustrations that his pains have not been resolved." (CX-10, pp. 1-2).

Claimant reported being "severely depressed" and recalled a history of nightmares related to the episode with the crane, which compelled Dr. Koy to consider a diagnosis of PTSD, "in urgent need of psychiatric treatment." Claimant exhibited pain in his neck or back which was relieved by "getting up from his chair or shifting position." (CX-10, p. 3).

Dr. Koy opined Claimant suffered a "near-death experience from which he has not recovered because it has not been recognized and adequately treated." He noted Claimant communicated "fairly clearly and at no time evidenced any obvious psychotic material." Dr. Koy concluded Claimant's inability "to perform physically has been a tremendous emotional injury and loss to him." (CX-10, p. 2).

Dr. Koy opined Claimant was severely anxious and depressed "to the extent of making me think of a psychotic depression" related to his injury, which Dr. Koy related to a "near death experience" that "mobilizes intense feeling[s] of anxiety, panic, feelings of hopelessness followed by anger and rage, which is then followed by intense feelings of guilt, which produces a massive depression."[29] Dr. Koy opined Claimant had not recovered from his "severe traumatization," partly because his post-injury treatment focused on the physical injury rather than the "mental and emotional aspects of his traumatization."

[29] According to Dr. Koy, Claimant reported contemplating suicide in the past, but was not homicidal. Dr. Koy subsequently reported Claimant's intense fear of dying related to his nightmares about the crane accident. (CX-10, p. 3).

He noted a "possible brain damage or a slow developing subdural hematoma" might be a possible ongoing injury. (CX-10, p. 4).

Dr. Koy's diagnoses included: (1) major depressive disorder, almost psychotic in nature; (2) PTSD; (3) learning disorder; (4) borderline intellectual functioning; (5)neck, shoulder, back and possible head injuries; and (6) severe occupational, financial and marital problems. (CX-10, pp. 4-5).

Dr. Koy's recommendations included: (1) psychotherapy, "2-3 times per week for a minimum of 6 months;" (2) Prozac, an antidepressant, in addition to Elavil, a sleep aid; (3) possible treatment at the pain clinic; (4) follow-up evaluation for the "possibility of a past or on-going head-injury as his first complaint to me was a severe headache starting at the time of accident." He hoped Claimant's pains would decrease with the use of anti-depressants and psychotherapy, which should decrease Claimant's need for pain medications that may be contributing to his anxieties and severe depression. (CX-10, p. 5).

Richard H. Morse, M.D., M.P.H.

On February 27, 2003, Dr. Morse, who specializes in pain management and who is board-certified in psychiatry and neurology, was deposed by the parties. On May 21, 2002, Claimant presented for a chronic pain evaluation upon the referral of Dr. Phillips. Dr. Morse reported his findings on May 21, 2002. (CX-8; CX-15, pp. 4-6, 20, 81-82).

According to Dr. Morse, Claimant reported no history of ongoing complaints of pain prior to his accident, nor was there any evidence that Claimant was receiving active treatment for a disorder at the time of his job injury.[30] Consequently, Dr. Morse concluded Claimant suffers from a physical and emotional condition related to the crane accident. He opined Claimant is emotionally disabled from returning to work and should not attempt to return without treatment. (CX-15, pp. 62-65).

[30] Claimant reported sustaining his injury when "the boom on the crane fell and [Claimant] was tossed about in the cab. He had immediate neck and back pain." Dr. Morse noted, "On specific questioning, [Claimant] denied suicidal ideation. . . . . Dr. Morse noted Claimant "can walk with a cane about two blocks, although he is in pain from the start. (CX-8, pp. 4-7).

Subsequently, Dr. Morse reviewed reports of Drs. Bianchini, Applebaum, Kronenberger, Watermeier, Mullener and Bunch which did not affect his own opinions.[31] From his review of the medical reports, Dr. Morse concluded the doctors generally agreed with his own opinions that: (1) Claimant is not "psychotic or malingering;" (2) Claimant does not appear to have an operable injury; (3) Claimant believes he is in pain; and (4) Claimant suffers some degree of depression and low self-esteem. According to Dr. Morse, "the question centers around how to divide the emotional and moderate physical problems and their interaction." (CX-15, pp. 7-8, 67-68).

Dr. Morse conceded his conclusion that the other doctors agreed that Claimant is not malingering is based on his limited review of medical reports, which did not reveal any diagnoses of malingering.[32] He admitted other physicians had not concluded Claimant was not malingering, nor had they "absolutely ruled it out." Thus, malingering was "a possibility." Dr. Morse indicated his examination of Claimant was insufficient to establish whether or not Claimant was malingering. (CX-15, pp. 8-9). Dr. Morse indicated Waddell's signs are signs of non-physiologic complaints. They may detect inconsistencies, but were "never meant to determine malingering." Waddell's signs are useful for a physician to determine whether an individual is a surgical candidate. Claimant's results indicated he would be a poor surgical candidate. (CX-15, pp. 59-61, 70-71).

Dr. Morse opined Claimant was not likely malingering. Rather, Claimant was "in the territory of a man with low intelligence, poor esteem, moderately depressed, who simply doesn't know his way out of the situation physically or emotionally and is going to need guidance and management." According to Dr. Morse, "we look for inconsistencies [and] contraindications" to determine whether a patient is malingering. He added, "It's not standardized, but we compare

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[31] In his May 21, 2002, chronic pain evaluation, Dr. Morse apparently reviewed the medical records of Drs. Katz, Aprill, Vogel, Applebaum, Kewalramani, and Phillips. (CX-8, pp. 1-4).

[32] On February 27, 2003, when Dr. Morse was deposed, Dr. Culver opined that Claimant was malingering after a review of medical records and a February 20, 2003 personal evaluation of Claimant. (EX-19; EX-20). Dr. Morse did not discuss Dr. Katz's opinion that Claimant exhibited "symptom magnification and has inconsistencies on his examination consistent with malingering." (See EX-14, pp. 67-68).

the patient's history to other patients like him" to determine whether malingering "seem[s] to fit or it is widely improbable." (CX-15, pp. 26-27).

Dr. Morse recommended a four-week intensive pain management program. (CX-8, pp. 8-9; CX-15, pp. 18-19). Dr. Morse would not defer to any physician regarding a recommendation for intensive pain management at a pain clinic, which he concluded is necessary for two reasons: (1) there is "no way to help [Claimant] surgically;" and (2) Claimant "isn't on his own getting anywhere." (CX-15, pp. 39-40).

Dr. Morse indicated "there are a number of things that are clues" which are useful for a determination whether or not a patient is a good candidate for a pain clinic. For instance, a post-injury return to work is a "good sign that [a patient] may be a good candidate and benefit from treatment. A negative sign would be . . . prolonged responses to treatment that where others should have recovered [the patient] didn't." However, ". . . we can only make a crude guess and recommendation at the intake." (CX-15, pp. 22-23).

"Oddly," Dr. Morse noted that findings by other physicians that Claimant was "greatly exaggerating his symptoms" did not "play a role into [his] evaluation as to whether or not a pain clinic will help [Claimant]. He explained, "if it is true that for emotional and non-malingering reasons [Claimant] is amplifying symptoms which could be better treated non-surgically by rehab, if one could diminish the emotional part of it," then a pain clinic would be "an excellent kind of program" for Claimant, who is "probably not smart enough and does not have the experience to do it himself." (CX-15, pp. 28-29).

According to Dr. Morse, Dr. Glynn generally agreed with his recommendation for pain management, but disagreed simply over recommending inpatient or outpatient treatment. After a review of Dr. Glynn's reports, Dr. Morse opined Claimant could receive less than one week of intensive, inpatient treatment. If Dr. Glynn opined Claimant needed no pain management, Dr. Morse would disagree with that opinion. (CX-15, pp. 39-43).

Dr. Morse noted Dr. Koy's opinion "departed from the others" because Dr. Koy found a "major depressive disorder with near psychotic features rather than a dysthymia which is a moderate grade depression" and "PTSD, a chronic post-traumatic stress disorder." Dr. Morse disagreed with a PTSD diagnosis, which generally depends on "an event to the patient or which he

witnessed to others that was considered life-threatening or of serious bodily harm." He was unsure that "even a patient with lower than average intelligence would interpret [Claimant's accident] as life-threatening, unless he were predisposed to it by previous accidents, had a fear of heights and so forth. But he wouldn't be working that high above the ground if he had a fear of heights anyway." Consequently, Dr. Morse did not find support for a diagnosis of PTSD. (CX-15, pp. 37-38, 48-49).

Rennie W. Culver, M.D., Ph.D.

On April 15, 2003, the parties deposed Dr. Culver, who is board-certified in psychiatry and neurology. At Employer/Carrier's request, Dr. Culver interviewed Claimant on February 20, 2003 and prepared a February 27, 2003 report.[33] (EX-19; EX-20, pp. 12-14, 128).

Dr. Culver reviewed depositions and "extensive" medical, vocational and other records which are identified in Dr. Culver's report.[34] After preparing his report, Dr. Culver reviewed the supplemental records of Dr. Katz and additional records of Dr. Koy. Dr. Culver's opinions in his report have not changed after reviewing the additional and supplemental records. (EX-19, p. 2; EX-20, pp. 14-21).

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[33] Claimant reported sustaining an injury while operating a crane "when the boom fell and jerked me around. He denied knowing if he sustained any loss of consciousness." (EX-19, p. 5). Dr. Culver reported Claimant's chief complaints included: "pain in his lower back, neck, right shoulder, and the 'right side of his right lower extremity," bilateral lower extremity weakness, depression, "numbness and tingling" in his hands and feet, "headaches from time to time. My pain don't keep me up. My depression does because I keep worrying because nobody helping me. My lawyer ain't doing nothing for me. Me and my family not getting along like I used to." (EX-19, p. 6).

[34] Among the various medical, chiropractic and other records he reviewed, Dr. Culver considered the records of Drs. Applebaum, Aprill, Glynn, Morse, Katz, Watermeier, Phillips, Vogel, Kewalramani, Bianchini, Mullener, Kronenberger, and Bunch. He also reviewed the vocational records of Ms. Favolora and the depositions of Claimant and Dr. Kronenberger. Dr. Culver noted, "I took all of the foregoing documents into account in my overall assessment of this case." (EX-19, p. 2).

Dr. Culver's "Axis I" diagnosis, which refers to a "current problem or what would be the presenting clinical problem other than a personality disorder," was malingering. He noted "few, if any objective findings" in Claimant's records supporting his subjective complaints, which are arising in a "medicolegal" context. Further, Dr. Culver concluded Claimant appeared uncooperative in the records, as indicated in his refusal to perform certain tasks during the FCE with Dr. Bunch.[35] Dr. Culver added that multiple examiners found multiple Waddell's signs. Consequently, Dr. Culver stated, "we have a patient in the context of what amounts to a workers' compensation claim . . . [who] has a maximum of complaints and minimum of objective clinical findings." Coupled with Claimant's uncooperativeness, Dr. Culver opined there are three of four basic indicators of malingering present. (EX-20, pp. 20-23, 29, 34-41).

Dr. Culver agreed with Dr. Bianchini's opinion that children, who "are well-known to do things like claim to have headaches or stomach aches [to] avoid going to school," may be capable of malingering. Dr. Culver "certainly" disagreed with a conclusion that diminished results on an IQ tests would establish that an individual is incapable of malingering.[36] (EX-20, pp. 35-37).

Dr. Culver's "Axis II" diagnosis, which is "a personality disorder and . . . a lifelong pattern of behavior," was "undetermined." Dr. Culver was unable to make a determination

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[35] Dr. Culver noted that Dr. Glynn's August 22, 2002 recommendation against an FCE for reasons related to symptom magnification was "remarkably prescient" because the FCE resulted in "poor validity" upon the occurrence of symptom and disability magnification as well as non-organic illness behavior. (EX-19, p. 13).

[36] Dr. Culver noted Dr. Kronenberger's report that "individuals with cognitive limitations are expected to be at a substantial disadvantage in any attempt to feign disability (due to a lack of knowledge about medical problems and lack of understanding about tests to determine functional capacities)." Dr. Culver opined Dr. Kronbenberger's statement supports a diagnosis of malingering by Claimant, "whose complaints and performance on physical examination and the FCE conform to an uninformed layman's notion of physical illness and disability as opposed to a physician's knowledge of such." Consequently, Dr. Culver opined Dr. Kronenberger did not consider the results of Claimant's FCE with Dr. Bunch. (EX-19, p. 19).

of a personality disorder due to a lack of information and specific testing helpful for a conclusion. (EX-20, pp. 29-30).

Dr. Culver offered no "Axis III" diagnosis, which refers to "a physical ailment or problem the patient has that would have some bearing upon his psychological or emotional functioning." Dr. Culver concluded Claimant does not suffer from "any particular medical problem that's clearly and equivocally diagnosed and documented." After reviewing and examining Claimant, Dr. Culver concluded Claimant's depression was "not very obvious," but might be "some mild degree of depression" of questionable significance due to "evidence he's been exaggerating and fabricating physical complaints." Dr. Culver opined the magnitude of Claimant's depression would "not impair his ability to function or work." (EX-20, pp. 30-31).

Dr. Culver opined that psychiatric help, counseling, assistance and medication were unnecessary for Claimant's condition. He concluded Claimant's treatment at a pain center would be unnecessary because Claimant was malingering. Even if Claimant's symptoms were the result of unconscious somatization, Dr. Culver opined a pain center would be unnecessary because pain clinics help patients with "genuine organic pain." Dr. Culver stated his opinion is consistent with Dr. Glynn's opinion that a pain clinic is unnecessary. (EX-20, pp. 31-33).

Dr. Culver concurred with Dr. Bianchini's opinion that Claimant suffers from no physical problem which would cause emotional depression.[37] He agreed that Claimant may have sustained a "minimal soft tissue injury," but not to the extent that it would cause psychological problems. (EX-20, pp. 33-34).

Dr. Culver generally disagreed with Dr. Koy's opinions. He disagreed with Dr. Koy's diagnosis of a major depressive order that is "almost psychotic in nature" because Claimant revealed no evidence of major depression upon psychological evaluation. He disputed Dr. Koy's conclusion that Claimant's depression was nearly psychotic because "psychosis would mean that he is losing contact with reality; he's becoming delusional." Dr. Culver noted Dr. Koy's report included no "particular documentation of [Claimnt's] psychotic thinking." Dr. Koy's report did not "include a formal mental status examination," in which "one would note a disturbance involving content of a psychotic

[37] Dr. Culver reported Claimant sustained a work-related soft-tissue injury, which should have resolved within two months post-injury. (EX-19, pp. 20-21).

nature." He noted Dr. Koy's report failed to mention the findings of Drs. Bunch, Katz, Glynn, Applebaum, Bianchini or Kronenberger that Claimant's complaints are disproportionate to objective findings. He also disagreed with Dr. Koy's diagnosis of PTSD. Claimant meets none of the criteria for such a diagnosis. (EX-20, pp. 53-63, 86-87).

Dr. Culver agreed with Dr. Koy that Claimant may have a learning disorder. He would not disagree with a conclusion that Claimant may have borderline intellectual functioning. Dr. Culver disagreed with Dr. Koy's remaining "Axis 4" and "Axis 5" diagnoses, noting a lack of evidence supporting a head injury and that the remaining two axes were "optional" and subjective rather than "clinical" in nature. He found the conclusions reached by Dr. Koy lacked support. (EX-20, pp. 63-69).

Dr. Culver disagreed with Dr. Koy's recommendations for psychotherapy and the use of anti-depressants, which are unnecessary. He disagreed Claimant needed further evaluation for a head-injury which was undocumented in Claimant's medical records. Recommendations for ongoing physical treatment are beyond the area of expertise of Drs. Culver and Koy, according to Dr. Culver. Such recommendations should be deferred to specialists in orthopedics, neurosurgery or physiatrics. Otherwise, Dr. Culver found "no basis from a psychiatric standpoint for disability." (EX-20, pp. 69-74).

Dr. Culver stated he did not ignore Claimant's complaints of depression in arriving at his conclusions. Rather, he specifically incorporated Claimant's depression into his findings and concluded Claimant did not suffer from major depression. He did not include depression in his diagnosis of Claimant "because of the overwhelming evidence that the patient was malingering; therefore, it would be very difficult to know how real his apparent or claimed depression would be." He did not quickly dismiss the opinion of any physician's recommendation, nor did he formulate opinions without reviewing Claimant's medical records. (EX-20, pp. 73-83).[38]

On cross-examination, Dr. Culver stated Claimant underwent IQ testing on two different occasions in which there was no evidence Claimant intentionally presented himself "at less than the stated IQ that was listed in the tests." Likewise, there

[38] Dr. Culver's responses in this part of his deposition were generally prompted by questions related to Dr. Koy's subsequent March 28, 2003 report which is not in evidence.

was no evidence indicating Claimant exaggerated intellectual or educational deficiency. Claimant's results indicated he functioned at the "low elementary level" of educational ability. Dr. Culver expected a high-school graduate to function at a higher level of ability. (EX-20, pp. 96-99).

Dr. Culver acknowledged Claimant reported a decrease in energy at his interview; however, Claimant specifically reported he had no thoughts of suicide. Claimant reported he could not satisfy his wife, which could be "somewhat of a feeling of worthlessness." A depressed individual might appear to have intellectual deficiencies which do not exist or may perform less well on psychological testing; however, Dr. Culver noted Dr. Mullener found that Claimant performed at the "lower end of borderline range of intellectual ability" and was unaware of any factors that might have adversely affected the validity of the results which were "accurate." (EX-20, pp. 100-110).

Dr. Culver opined depression-related appetite disturbances generally result in weight loss. He noted Claimant, who gained weight, reported a "good" appetite rather than an "unusually good" appetite or a symptom of psychiatric illness in which Claimant eats "six times a day" but cannot stop. Although Claimant reported eating made him "feel better," the report was not an indication of "an affective disturbance," because Claimant was discussing his physical pain rather than a vegetative symptom of depression." Dr. Culver attributed Claimant's weight gain to physical inactivity and a history of watching television, going to the movies, and going "out to eat." (EX-20, pp. 110-113).

The Vocational Evidence

Nancy Favolora

On April 15, 2003, Ms. Favolora was deposed by the parties. She is a vocational rehabilitation counselor who testified as a vocational expert. At Employer/Carrier's request, Ms. Favolora conducted a vocational interview of Claimant, administered vocational testing and prepared an October 10, 2002 vocational report. (EX-6; EX-22, pp. 4-6, 69-72).

Ms. Favolara administered three verbal and word identification tests which were included in her vocational analysis. Claimant's scores on the tests indicated: (1) a grade equivalency of 4.2 in the area of letter-word identification, which is not uncommon according to Ms. Favolora, who noted "I

see many people at that level;" (2) a grade equivalency of 6.7, in the area of passage comprehension, which is "consistent with reading a newspaper"; and (3) a grade equivalency of 8.8 in the area of math. Id.

Ms. Favolora agreed there are a variety of medical opinions regarding Claimant's physical restrictions and limitations. She noted Claimant was not restricted by Dr. Katz, but was restricted by Dr. Applebaum to "moderate work" involving "no prolonged bending or stooping or lifting any loads greater than forty or fifty pounds." She reported Dr. Phillips made no specific diagnosis and deferred to the opinion of Dr. Vogel who recommended further testing. Accordingly, pursuant to the opinions of Drs. Katz and Applebaum, Ms. Favolora concluded Claimant could return to work. (EX-6, p. 7; EX-22, p. 14).

Although Dr. Katz released Claimant to work without restrictions, Ms. Favolora identified six locally available employment positions with lighter exertional requirements that were within Claimant's physical restrictions assigned by Dr. Applebaum. The jobs were sedentary or "mostly light" duty. Sedentary jobs require lifting no more than ten pounds and are jobs in which an applicant is "mostly seated during the workday." Light-duty jobs require lifting up to ten pounds frequently, up to 20 pounds occasionally and may require applicants to stand for the majority of the workday. (EX-22, pp. 12-17).

Ms. Favolora identified a job as a garage cashier at the Royal Sonesta Hotel which requires "minimal training" to educate applicants to "accept parking tickets and payments, accept cash and credit cards [and] use a register system." Complex math is not required. Claimant may "stand when he wants to or he can stay seated the whole time." The garage cashier position paid an hourly wage of $6.50. (EX-6, pp. 5-6; EX-22, pp. 17-19).

A position as an unarmed security guard was available with Weiser Security, which offered numerous positions that would not involve "apprehension of anyone." For instance, a gate guard at an apartment complex requires an applicant to confirm identification of arriving or departing residents and guests. Lifting up to 20 pounds might be necessary. An applicant would be "mostly seated at a gate or in an office building." Hourly wages for the jobs ranged from $6.00 to $7.00 per hour. (EX-6, p. 6; EX-22, pp. 19-20).

A toll collector position was available with the Crescent City Connection, which would require applicants to sit or stand, "whatever they prefer," at the toll booth, where cash or its equivalent are collected. Applicants are required to make change and count their take at the end of a shift, when they empty a trash can and remove it at the end of the day. Twice per shift, an applicant must carry a cash drawer which weighs between 20 and 30 pounds. The job paid $7.50 per hour. (EX-6, p. 6; EX-22, pp. 20-21).

A shuttle bus driver position was available at the Treasure Chest Casino. An applicant would be required to drive passengers in a vehicle equipped with an automatic transmission and power steering between a parking area and the main building. A simple, written report might be necessary if an incident occurs. Assistance may be provided for the completion of written reports. Claimant would need to obtain a commercial driver's license (CDL), which may be "accomplished during the admission process." No lifting is required. Entry-level positions pay $7.00 per hour. (EX-6, p. 6; EX-22, p. 21).

A production technician job was available with Allfax Specialties, which recycles and rebuilds toner cartridges for facsimile machines. The job requires applicants to use their hands to disassemble and assemble cartridges. Applicants are required to "alternatively sit, stand, or walk." Applicants must lift up to ten pounds most of the time, but might be required to lift a box of cartridges that weighs up to 25 pounds. The frequency at which applicants must lift a full box of cartridges was not provided. The job paid an entry-level hourly wage of $7.50. (EX-6, p. 6; EX-22, pp. 22-23).

A Customer Safety Dispatcher job with Harrah's Casino was available which required applicants to "take telephone calls from various departments" and relay information to appropriate personnel via a two-way radio. Training was provided on-the-job. An applicant would be required to lift up to ten pounds and occasionally "bend, reach, stretch, kneel, twist or grip items." Starting salary for the job was $17,000.00 per year, which equates to an hourly wage of $8.17 based on a 40-hour work week. (EX-6, p. 7; EX-22, pp. 23-24).

If Claimant could only read at the third-grade level, the customer safety dispatcher job and unarmed security jobs would possibly be inappropriate. Claimant could otherwise be trained to perform the remaining jobs. (EX-22, pp. 25-28).

On cross-examination, Ms. Favolora indicated Claimant could rely on various sources to aid his job search. For instance, he could seek the services of a vocational rehabilitation counselor, apply for services through the Louisiana Rehabilitation Services or go to "the job service office," which would assist him. If he believed he was disabled, Claimant could request vocational rehabilitation services from DOL. (EX-22, pp. 39-40).

Ms. Favolora stated CDL applicants may be provided with videotapes to prepare for the test. Applicants with poor reading ability might be offered assistance in taking the examination. (EX-22, pp. 52-53). Based on an assumption that Claimant "had no useful ability to function in the area of behaving in an emotional, stable manner," Ms. Favolora stated "[M]any people who don't behave in an emotionally stable manner do work. It could affect his ability to maintain employment." If Claimant's ability to understand simple instructions was "seriously limited," such a limitation would probably constitute and impediment to employment. If Claimant were unpredictable in social situations, he probably would not keep jobs requiring him to "be around people." Ms. Favolora noted Claimant was not required to be around people in all of the positions she identified. If Claimant's attention, concentration and ability to manage work stress was "seriously limited," he "probably would not maintain employment." (EX-22, pp. 56-60).

Other Evidence

Richard William Bunch, Ph.D., P.T.

On February 18, 2003, Dr. Bunch was deposed by the parties. Dr. Bunch is not a medical doctor. He is a licensed board-certified physical therapist, a clinical associate professor, an ergonomic specialist, an industrial injury prevention consultant and the CEO and Owner of Industrial Safety and Rehabilitation Center (ISR), which provides physical therapy, functional testing, new hire testing, return to work testing and disability evaluations. He has 20 years of post-doctorate experience in the field of physical therapy, administering FCEs and teaching. He primarily focuses on FCEs. (EX-18, pp. 4-23).

Dr. Bunch reported Claimant's February 6, 2003 FCE. Claimant was referred to Dr. Bunch by Employer/Carrier. Claimant arrived with Ms. Carroll to undergo his FCE. Claimant indicated he was operating a crane when the boom fell and jerked

him inside the crane.[39] He doubted he could return to "any type of work and that he has pain all the time." Claimant reported "quite extensive" areas of pain on a pain diagram of a patient intake form, including the neck, shoulder, back of the right arm, lower back, chest, front of the right arm, front of the right forearm, both thighs, front of the right lower leg beneath the knee and the entire back of the right leg to the calf area. (EX-17, pp. 25-28; EX-18, pp. 23-28).

Dr. Bunch found no signs of palpable spasm. Claimant inconsistently reported painful areas in the mid-thoracic and cervical areas of his body. At times Claimant walked slowly without significant signs of an "antalgic gate," yet at other times he "seemed to walk okay." Claimant revealed "breakaway weakness or little evidence of resistance on manual muscle testing." During episodes of breakaway weakness, Dr. Bunch observed no correlation between muscle tightness, spasm or symmetry that would indicate correlative pain or sensitivity. Claimant was positive for four out of five Waddell's tests for non-organic illness. (EX-18, pp. 61-63, 78-82).

Claimant was able to complete approximately half of the FCE before he discontinued the evaluation due to complaints of increased pain. Dr. Bunch concluded the FCE revealed poor results based on signs of "submaximal effort," as demonstrated in Claimant's grip strength test, lifting tests, and other results on examination which were inconsistent with Claimant's musculature and abilities he displayed elsewhere in the FCE during his physical assessment.[40] Likewise, there was an overall

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[39] According to Dr. Bunch's "intake interview" report, Claimant reported injuries to his "neck, shoulder, and back . . . while working as a crane operator for [Employer]. He stated that the injury resulted from being thrown around in the crane cabin when the boom on the crane fell." (EX-17, p. 5). Claimant reported "chest pains and feels numbness and tingling sometimes." (EX-17, p. 1).

[40] During the performance of "work simulated functional tests," Claimant completed one of five stair climbing repetitions and reported increased pain in the lower back and right lower extremity. He climbed two rungs of a vertical ladder during the first of three climbing repetitions and discontinued the test due to severe pain in the right side of his body. A slanted ladder climbing exercise was not performed due to poor tolerance of the vertical ladder exercise. Claimant completed one and one-half repetitions of a 12-degree ramp climbing exercise,

"lack of organic signs that would support the nature and severity of [Claimant's] complaints and disability. Dr. Bunch noted Claimant did not use a cane at the FCE, despite reporting the use of such a device for over one year. Further, there was no atrophy in Claimant's muscles despite the reported length of time in which Claimant relied on a cane to walk.[41] (EX-18, pp. 32-39, 42-50, 63-82).

Dr. Bunch concluded Claimant indicated signs of disability magnification behaviors which may reflect a conscious behavior directed at controlling the outcome of the FCE or unconscious behavior related to psychological overlay. Dr. Bunch could not determine whether Claimant's exaggeration was the result of conscious or unconscious behavior. He was unable to determine whether Claimant could return to his prior occupation due to non-organic illness behavior. Likewise, he was unable to determine Claimant's physical demand level and restrictions due to non-organic illness behavior. (EX-18, pp. 33-34, 39-40).

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which was stopped due to a report of "severe pain rated 8/10; heart rate 129." A shoveling exercise was not performed. Claimant refused 9 of 17 "material handling tasks" due to reports of severe pain. (EX-17, pp. 3-5).

[41] Dr. Bunch noted, in pertinent part:

> [I]t was discovered that [Claimant] did not walk into the clinic using a cane. Due to the report of chronic pain in the right lower extremity, [Claimant] was asked whether or not he used a cane to walk. [Claimant], upon questioning in front of [Ms. Carroll], reported that he normally uses a cane to walk in order to avoid full weight bearing on the right lower extremity. When he was asked why he did not use the cane when arriving for this evaluation, he responded that he was told not to use the cane during the FCE. The use of a cane to avoid weight bearing on the right leg, as reported by [Claimant], typically results in disuse atrophy of the right lower extremity or at least, reduced muscle tone. I am perplexed as to why [Claimant] was instructed not to use a cane during the FCE.

(EX-17, pp. 8-9).

Dr. Bunch indicated an increase in a patient's heart rate coupled with concurrent painful physical palpation might be "a pretty good response that there is heart rate response to a painful area" as opposed to "heart rate increasing due to physical exertion." According to Dr. Bunch, a patient's heart rate and systolic blood pressure "always" increase during physical exertion. (EX-18, pp. 32-33, 50-51). He noted Claimant's heart rate dropped during bilateral straight leg raising tests at times when Claimant reported increases in pain to "severe" levels.[42] (EX-18, p. 75).

Claimant's heart rate and blood pressure were measured before, during and after the FCE. Prior to the administration of the FCE, Claimant exhibited moderate hypertension with a blood pressure of 138 over 82. His heart rate was 94, which is "on the high side of normal." Dr. Bunch immediately advised Claimant to see a doctor to check his blood pressure because cardiovascular disease is a leading cause of death in similarly situated males of Claimant's age. (EX-17, p. 3; EX-18, pp. 28-32, 50-54).

During the FCE, Claimant's blood pressure increased to 150 over 100 while his heart rate increased to 101; however, his heart rate was not at unsafe levels, and his blood pressure was "not in the area of severe hypertension" which would warrant discontinuing an FCE. Notwithstanding cardiovascular concerns, Claimant did not request to end the FCE due to his blood pressure and heart rate. He specifically requested to discontinue the FCE due to reports of increased pain. (EX-18, pp. 57-58).

After the FCE, Claimant's blood pressure was 140 over 98, which is classified as moderate hypertension. Claimant's blood pressure was in a normal and expected range compared to his pre-FCE blood pressure. Claimant's post-FCE heart rate was 115, which was not unexpected after physical exertion. (EX-17, p. 6; EX-18, pp. 53-55).

Dr. Bunch noted that systolic blood pressure may increase under stress, anxiety, physical pain or the perception of physical pain; however, diastolic blood pressure is usually unaffected by pain. Rather, it is affected by the overall cardiovascular condition related to physical exertion.

[42] During the "bilateral SLR test," Claimant reported severe lower back pain, which was rated "7/10," while his heart rate was "84." (EX-17, p. 7).

Diastolic blood pressure may rise as much as ten points during an FCE; however, Claimant's rose 20 points, which implies he might have a cardiovascular condition. That's why I was concerned. I said you need to go get checked by a medical doctor." (EX-18, pp. 55-56).

Dr. Bunch concluded Claimant was not always entirely inconsistent while describing his symptoms; however, there were too many inconsistencies to conclude Claimant gave a valid effort during the FCE. Likewise, there were a significant number of Waddell's signs, symptoms of non-organic illness behavior and "pretty strong contradictions," namely "isometric weakness versus the manual muscle testing [and] the inconsistencies between the neuro[logical] stress tests," which precluded Dr. Bunch from concluding the FCE was a reliable test. (EX-18, pp. 81-85).

On cross-examination, Dr. Bunch stated he directs patients to refrain from taking pain medications before an FCE. He noted Claimant, who reported complaints of pain from prolonged sitting and standing, was likely in a sitting position for approximately two hours during the completion of pre-FCE paperwork before his blood pressure was initially taken. Pain from the pre-FCE process or anxiety over the upcoming FCE may increase blood pressure. Dr. Bunch was told Claimant gained 60 pounds in two years post-injury. Such weight gain would not interfere with the administration of a Fabere test, especially in this matter in which Claimant was "barely moved" before complaining of pain. (EX-18, pp. 86-98).

The Contentions of the Parties

Claimant contends he was injured on February 25, 2001 and was paid compensation benefits until March 25, 2001, when Employer/Carrier terminated his benefits. He claims he never reached maximum medical improvement. He claims he unsuccessfully attempted a trial work period in July and August 2001. Otherwise, his disability status has remained temporary total since his job injury.

Claimant argues "all physicians" restricted him from returning to his prior occupation without restrictions. He asserts his physical problems are aggravated by psychiatric problems which totally disable him from returning to work. He contends Employer/Carrier failed to establish suitable alternative employment within his physical restrictions and limitations.

On the other hand, Employer/Carrier argue Claimant is neither physically nor psychologically disabled. They assert none of the physicians were able to find any organic determination regarding the source of Claimant's pain. They contend Claimant's complaints of pain are not credible because of multiple findings of symptom exaggeration. Consequently, they argue Claimant does not need any further medical treatment or compensation benefits.

Employer/Carrier assert Claimant may return to his prior occupation or, alternatively, that he may return to work within his physical restrictions and limitations to suitable alternative employment established by vocational expert Favolora. Lastly, Employer/Carrier contend they are not liable for reimbursement for costs incurred by Claimant for medical treatment from any physicians other than Dr. Katz or Dr. Katz's referrals because Claimant voluntarily selected Dr. Katz as his physician who treated Claimant and determined no further medical treatment was necessary.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Credibility

The administrative law judge has the discretion to determine the credibility of a witness. Furthermore, an administrative law judge may accept a claimant's testimony as credible, despite inconsistencies, if the record provides substantial evidence of the claimant's injury. Kubin v. Pro-Football, Inc., 29 BRBS 117, 120 (1995); See also Plaquemines Equipment & Machine Co. v. Neuman, 460 F.2d 1241, 1243 (5th Cir. 1972); Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999).

Employer/Carrier argue Claimant's complaints are entitled to no probative value because there is substantial evidence in the record establishing Claimant's complaints are exaggerated. They argue Claimant's complaints lack objective evidentiary support. They aver Claimant was malingering, or, alternatively, somatizing symptoms unrelated to Claimant's job injury. They further argue Claimant's evolving description of his job injury diminishes the credibility of his complaints.

Claimant's attorney argues Claimant's complaints of symptoms are credible. He contends Claimant's elevated blood pressure during the performance of the FCE demonstrates a response to pain. He alleges Claimant is incapable of malingering due to Claimant's diminished intellectual ability. Further, he argues Claimant's complaints are the result of unconscious somatization, which is related to his job injury or, alternatively, associated with depression related to his job injury.

Claimant's burden of persuasion rests principally upon his testimony, which is not generally corroborated by the testimony of his treating and evaluating physicians nor supported by objective clinical findings. Claimant has seen 12 doctors, and his MRIs and myelograms do not show any objective basis for his injury or pain. I agree with Employer/Carrier that Claimant's description of his job accident/injury varied among his doctors and that his concomitant complaints of symptoms in the medical records were at times mutually contradictory, vacillating, and presented in an inconsistent manner, which further erodes the reliability of Claimant's complaints.

Moreover, I am persuaded by the independent and multiple findings of symptom exaggeration and/or breakaway weakness reported by Drs. Katz, Glynn, Applebaum and Bunch to conclude

Claimant's complaints are exaggerated and are entitled to little probative value. A conclusion that Claimant exaggerated his symptoms is buttressed by the opinions of Drs. Bianchini, who specifically found evidence of symptom magnification upon psychological testing, and Dr. Kronenberger, who admitted Claimant's psychological testing revealed a tendency to exaggerate and that Claimant's complaints appeared "out of proportion" to the objective findings of record.

Further, I find Dr. Kronenberger's opinion that results achieved on Claimant's MMPI are questionable due to Claimant's intellectual ability is undermined by Dr. Bianchini's uncontroverted testimony that Claimant's results failed to demonstrate a lack of understanding based on objective intrinsic indicators generated during testing. Likewise, I find Dr. Kronenberger's opinion that an MMPI is inaccurate for individuals with low IQs is undermined by his admission that he is aware of no studies supporting his opinion and contradicted by Dr. Culver. Accordingly, I agree with Employer/Carrier that Claimant's complaints were exaggerated.

I find Dr. Katz's testimony that he continued providing medications to Claimant to afford Claimant the "benefit of the doubt" does not establish Claimant continued suffering from objective and disabling manifestations of pain. Dr. Katz elsewhere persuasively opined he found no objective evidence of Claimant's pain. Dr. Katz's prescriptions were of notably short duration. Consequently, I find Dr. Katz's brief prescriptions or injections do not establish ongoing objective manifestations of symptoms.

I find Claimant's increased blood pressure and heart rate during the performance of the FCE are not persuasive in establishing that Claimant's complaints of pain are credible. Elsewhere in the FCE report, Claimant's heart rate fell when he reported a severe increase in pain, which would be inconsistent with pain-related responses according to Claimant's argument. Further, the record indicates Claimant reported a family history of high blood pressure and that his blood pressure was previously elevated at Touro on February 28, 2001, three days after he was restricted from returning to work. The contrary testimony offered by Dr. Bunch and Ms. Carroll, neither of whom are medical doctors, further diminishes the usefulness of Claimant's blood pressure readings during the FCE to establish whether his complaints of pain are credible. Consequently, I find Claimant's blood pressure readings during the

administration of the FCE are of little probative value in resolving whether Claimant's complaints of pain are credible.

The persuasiveness of Employer/Carrier's argument that Claimant is malingering is buttressed by the opinions of Drs. Bianchini and Culver, who opined individuals of low intellectual capacity are not incapable of malingering. Dr. Bianchini specifically opined individuals of diminished intellectual capacity may try to malinger. Dr. Katz's uncontroverted testimony that Claimant could complete allegedly painful movements without pain upon distraction and that Claimant was asymptomatic until Claimant realized Dr. Katz was observing him arguably buttresses a conclusion that Claimant tried to malinger.

Further, Dr. Bianchini indicated individuals of diminished intellectual ability may attempt to malinger simply by complaining of "a lot of symptoms." A review of the record indicates Claimant complained of a variety of symptoms, including: (1) tenderness in the cervical, thoracic and lumbar areas and in his right leg; (2) cervical pain from the lower neck to the area between his ears, where he complained of headaches; (3) central back pain without radiation into his legs or buttocks; (4) pain from his shoulders all the way down into his legs; (5) severe pain across his low back through buttocks without numbness or tingling into the feet; (6) back pain into his neck and pain in both shoulders; (7) pain across his back and into the left thigh without numbness or tingling into the feet; (8) cervical and lumbosacral pain with bilateral arm and leg pain; (9) right arm pain plus paresthesia into the right hand; (10) severe lumbosacral pain into the right leg; (11) numbness and tingling into his feet; (12) cervical, dorsal and lumbar pain radiating into the right lower extremity; (13) tingling in his right foot, bilateral leg weakness and numbness, weakness, depression; (16) weight gain; (15) sleeplessness due to pain; (16) sleeplessness due to depression and anxiety; (17) tingling in both hands, headaches and dizziness; (18) pain in the left shoulder, weakness and numbness in the left arm, and constant pain between the shoulder blades; (19) ongoing neck and back pain, bilateral leg pain which radiated into his feet; (20) numbness into the fingers; (21) nightmares; and (22) pain into the right hand and right leg. Consequently, the record arguably supports a finding that Claimant was malingering.

A conclusion that Claimant is malingering is also buttressed by Dr. Culver's opinion. Dr. Culver interviewed Claimant and considered many medical records, including the

records of Drs. Morse, Mullener, Koy, and Kronenberger, to complete his analysis, which is well-reasoned and persuasive. Dr. Culver's opinion is supported by the findings of Dr. Katz, who specifically opined Claimant exhibited inconsistencies on examination consistent with malingering. Further, Dr. Culver reasonably explained Claimant's poor results and indications of possible malingering during objective FCE testing were consistent with the opinions of Drs. Kronenberger and Bianchini, who opined individuals with cognitive limitations might be at a disadvantage while attempting to feign a disability. Accordingly, the record tends to support a finding of malingering.

On the other hand, I find Dr. Morse's conclusion that Claimant was not likely malingering is less persuasive than Dr. Culver's opinion. He specifically opined no direct diagnoses of malingering were rendered by any of the doctors of record; however, Dr. Culver's contrary opinion and Dr. Katz's findings undermine Dr. Morse's conclusion. Notwithstanding the opinions of Drs. Culver and Katz, Dr. Morse conceded malingering was a possibility, based on the other medical records.

Further, Dr. Morse acknowledged that "inconsistencies and contraindications" are useful for a determination of malingering, yet failed to adequately discuss the multiple findings of inconsistencies reported by the various doctors of record. Likewise, Dr. Morse failed to adequately explain why numerous physicians' findings of multiple Waddell's signs in this matter should not be considered to determine whether Claimant is malingering. Although he indicated Waddell's signs were created for surgical purposes, Dr. Morse conceded the signs are nevertheless useful for establishing inconsistencies. Thus, I find Dr. Morse's conclusion that Claimant was not likely malingering is not as well-reasoned as that of Drs. Culver and Katz.

Similarly, I find Dr. Koy's opinion that Claimant was not malingering was neither well-reasoned nor persuasive. He failed to discuss inconsistencies and symptom exaggeration noted in Claimant's medical records and otherwise provided no adequate explanation of the basis for his opinion. Moreover, Dr. Koy's conclusion was generally devoted to his understanding of Claimant's condition following a "life threatening" event which is not established in the record, and which is inconsistent with the opinions of Drs. Morse and Culver. Accordingly, I find Dr. Koy's opinion that Claimant was not malingering lacks evidentiary support and is not well-reasoned.

It is noted Drs. Bianchini and Kronenberger could not conclude Claimant was malingering, based on the evidence they considered. As discussed in greater detail below, I find Dr. Kronenberger's opinion, which was the result of a "targeted evaluation" based on limited records, is entitled to little probative value. Although Dr. Bianchini testified his opinions did not change after a review of additional medical records, he did not discuss the additional records he considered or why his opinion would not change. I find his explanation is not as well-reasoned as the opinion of Dr. Culver, who discussed additional medical records affecting his opinion.

I find Claimant's psychological complaints are not reliable in establishing the extent of those symptoms. Claimant reported a history of depression to Drs. Phillips and Watermeier, yet failed to report a history of depression to Drs. Katz or Vogel. Although Claimant checked a box on an October 1, 2001 report indicating "depression" was a symptom when he treated with Dr. Applebaum, there is no significant discussion of depression in Dr. Applebaum's reports. On August 22, 2002, Claimant reported to Dr. Glynn that he was "somewhat depressed," yet a history of Claimant's depression is not established in the records of Dr. Kewalramani, who examined Claimant from December 2001 through January 2003. In February 2003, a little more than one month after he last treated with Dr. Kewalramani, Claimant reported an ongoing history of "severe" depression and ongoing nightmares to Dr. Koy, who considered a diagnosis of "psychotic" depression.

Moreover, Claimant reported suicidal tendencies to Dr. Mullener, yet denied suicidal tendencies to Drs. Kronenberger, Morse and Culver. Further, he reported a history of contemplating suicide to Dr. Koy, but also described severe, ongoing nightmares related to his "fear of death" to Dr. Koy. Claimant reported sleeplessness due to pain to Drs. Bianchini and Mullener, yet elsewhere reported to Dr. Culver that his sleeplessness was due instead to depression, or alternatively, to a combination of depression and pain. Consequently, I find Claimant's inconsistent complaints of his depression and attendant symptoms are not helpful for a resolution of this matter.

In light of the foregoing, I find Claimant's subjective complaints of symptoms are entitled to little probative value. I will rely on his complaints to the extent there is supporting objective medical evidence in the record.

B. Nature and Extent of Disability

The parties stipulated that Claimant suffers from a compensable injury, however the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or

usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

C. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication. Moreover, the entirety of Claimant's symptoms includes both physical and psychological complaints, which are addressed separately for purposes of clarification.

1. Claimant's Physical Complaints

Of the physicians who treated Claimant for his physical complaints, Drs. Katz (orthopedics), Applebaum (neurosurgery), Vogel (neurosurgery), Glynn (pain medicine), Phillips (orthopedics), Watermeier (orthopedics), Morse (neurology/psychiatry) and Culver (neurology/psychiatry) generally offered opinions regarding the permanency of Claimant's physical condition. Dr. Kewalramani (pain medicine) conceded he was unable to treat Claimant and deferred to Dr.

Watermeir. Dr. Aprill (radiologist) could not render an opinion whether spinal abnormalities were symptomatic for Claimant.

Dr. Katz's opinion that Claimant reached maximum medical improvement and could return to work without restrictions on March 22, 2001 is generally consistent with Dr. Culver's opinion that Claimant's physical condition should have resolved within two months and Dr. Glynn's opinion that Claimant could return to work; however, the persuasiveness of their opinions is undermined by the neurological opinions of Drs. Vogel and Applebaum, who restricted Claimant from returning to work pending further evaluation.

I find the opinions of Dr. Applebaum, who opined Claimant reached maximum medical improvement on November 12, 2001, are more convincing and better reasoned than the opinions of Dr. Vogel. Dr. Applebaum considered additional medical records and test results to form his conclusions that Claimant sustained no neurological impairment. Moreover, Dr. Vogel only rendered a "suspected diagnosis" in his reports, while Dr. Applebaum offered his opinions by way of reports as well as by deposition in which he was subject to cross-examination. Consequently, I accord Dr. Applebaum's opinions greater probative value than those of Dr. Vogel.

Additionally, Dr. Vogel's diagnosis of a suspected instability was undermined by Dr. Katz's compelling explanation disputing such a suspected diagnosis. Although Dr. Katz admitted he was not provided radiological evidence supporting or refuting Dr. Vogel's conclusion, it is noted Dr. Vogel described no such evidence in his reports, nor has any been submitted into the record. I find Dr. Katz's explanation that Claimant does not suffer from spinal instability is buttressed by Dr. Applebaum's conclusion that Claimant suffers from no spinal disorder or disease.

It is noted that no physician recommended surgery in this matter. I find Claimant's physical complaints generally reached a plateau upon Dr. Applebaum's evaluation and remained consistent thereafter. Consequently, I am inclined to conclude Claimant reached maximum medical improvement on November 12, 2001, pursuant to the well-reasoned opinion of Dr. Applebaum, who, unlike Dr. Vogel, was deposed by the parties and subject to cross-examination.

I find the subsequent opinions of Drs. Phillips and Watermeier, who diagnosed Claimant's condition as permanent and

total, are not as persuasive in establishing whether or not Claimant reached maximum medical improvement and do not decrease the persuasiveness of the contrary medical opinions of record. They treated Claimant well after he was treated by Dr. Katz, who treated Claimant shortly after the instant job injury. Their opinions that Claimant suffers a lumbar disc condition are weakened by the logical opinions of Drs. Aprill and Applebaum, who reported no abnormalities in Claimant's lumbar spine after a review of the radiological results.

It is noted that Dr. Vogel no longer suspected lumbar disc herniation after his review of Claimant's MRI results, which arguably implies Dr. Vogel agreed with the conclusions of Drs. Aprill and Applebaum that Claimant sustained no lumbar disc herniation based on his MRI results. Likewise, Dr. Kewalramani reported Claimant's lumbar MRI results were within normal limits. Consequently, I find the opinions of Drs. Phillips and Watermeier are neither well-reasoned nor convincing.

Moreover, the persuasiveness of the opinions of Drs. Phillips and Watermeier is impaired by Dr. Phillips's report that he would withhold any further opinions pending the review of radiologists' reports. The record does not establish whether those records were provided to or considered by either physician.

Likewise, Dr. Phillips's opinion that the etiology of Claimant's symptoms was indeterminable on the basis of a single evaluation and without the review of Claimant's medical records from other physicians detracts from the probative value of his opinion. The record does not establish Dr. Phillips or Dr. Watermeier ever received the medical records Dr. Phillips concluded would "certainly" help to render a diagnosis.

Additionally, Drs. Phillips and Watermeier diagnosed Claimant with cervical and thoracic strain; however, they offered no explanation why such injuries which occurred in February 2001 would remain problematic through September 2002. Further, both physicians reported normal neurological results and found Claimant's reflexes were normal with no evidence of nerve entrapment. Further, I find Dr. Applebaum's contrary conclusions in his February 24, 2003 report are convincing, which derogates the persuasiveness of the opinions of Dr. Phillips and Watermeier.

Similarly, Dr. Morse's opinion that Claimant suffers from a soft tissue injury is undermined by the opinions of Drs. Katz,

Applebaum, Glynn, and Culver, who generally agree Claimant suffers from no ongoing physical impediment related to his job injury. Dr. Morse failed to adequately provide the basis for his conclusion that Claimant continues to suffer physical abnormalities in light of his reports of multiple normal findings upon examination by the physicians whose records he reviewed. His reports of the normal findings on MRI testing further disparages his conclusion that Claimant continues to physically suffer from a soft tissue injury.

It is noted that Drs. Phillips and Watermeir reported muscle spasms in the trapezius and in the cervical and lumbar areas upon physical examination; however, their findings are undermined by contrary findings of Drs. Katz, Applebaum, Glynn, and Bunch. Likewise, Dr. Kewalramani never reported findings of discernable muscle spasm in the cervical region during his treatment of Claimant between December 11, 2001 and January 15, 2003. Although Dr. Kewalramani reported findings of muscle spasm in the dorsolumbar or lumbar areas on December 11 and 27, 2001, he reported no such spasms in his subsequent 2002 and 2003 reports. Consequently, I find the contrary findings of record further erode the persuasiveness of the reports of palpable muscle spasms by Drs. Phillips and Watermeier.

Moreover, it is noted that Dr. Morse opined the flattening of the lordotic curve observed on Claimant's March 15, 2001 cervical MRI was a "reaction to spasm." His opinion is belied by the absence of concurrent physical findings of muscle spasm when the MRI was performed. His opinion is further extenuated by the MRI report which indicates Claimant's "gentle reversal" of the cervical lordosis may be "merely on the basis of neck flexion and position within the neck coil."

In light of the foregoing, I am persuaded by Dr. Applebaum's cogent and well-reasoned opinions to conclude Claimant reached maximum medical improvement on November 12, 2001. All periods of disability prior to November 12, 2001 are considered temporary in nature.

February 25, 2001 through November 11, 2001

Claimant was originally restricted from work by Touro personnel through March 5, 2001, when he would be reevaluated. On March 5, 2001, Claimant did not return to Touro, but visited Dr. Katz instead. Dr. Katz prescribed physical therapy, recommended conservative treatment and restricted Claimant from returning to work until March 22, 2001.

As noted above, Dr. Katz's opinion that Claimant could return to work without restrictions on March 22, 2001, is undermined by the unanimous opinions rendered by the parties' neurosurgeons who restricted Claimant from returning to work pending further evaluation. Consequently, I find Claimant established a **prima facie** case of total disability following his February 25, 2001 job injury. His disability status is considered temporary total from February 25, 2001 through November 11, 2001.

November 12, 2001 to October 9, 2002

After Claimant reached maximum medical improvement on November 12, 2001, his condition became permanent. I find Claimant was unable to return to his prior occupation based on Dr. Applebaum's assignment of physical restrictions that would preclude a return to longshore employment. I find Dr. Applebaum's deposition testimony that his opinion would not change after reviewing Dr. Glynn's reports is persuasive in establishing Claimant remained restricted following November 12, 2001. Thus, Claimant's disability status is considered permanent total from the date he reached maximum medical improvement until October 9, 2002.

October 10, 2002 to February 23, 2003

On October 10, 2002, Employer established suitable alternative employment reasonably available to Claimant within his physical restrictions and limitations, as discussed more thoroughly below. Accordingly, from October 10, 2002 to February 23, 2003, Claimant's disability status is considered permanent partial, based on the difference between his pre-injury average weekly wage of $792.00 and his post-injury wage-earning capacity of $268.64, as calculated below.

February 24, 2003 to Present and Continuing

On February 24, 2003, Claimant contends Dr. Applebaum implicitly continued his restrictions because Dr. Applebaum failed to explicitly lift the restrictions of no lifting greater than 50 pounds and no prolonged bending, stooping and bending when he concluded Claimant could return to work. Employer argues Dr. Applebaum implicitly lifted his restrictions by opining Claimant suffers from no disease of the spinal cord and nerve roots, nor from any neurological impairment which would preclude his return to work.

I find Employer's argument more compelling. In his February 24, 2003 report, Dr. Applebaum specifically disputed Dr. Watermeier's diagnoses of a cervical displacement, lumbar disc syndrome and a soft tissue injury, namely a cervical/dorsal/lumbar strain. After reviewing records which were previously unavailable, Dr. Applebaum opined Claimant suffered from "no disease or damage involving the spinal cord or nerve roots" and that "there is no neurological impairment that would prevent [Claimant] from returning to work." Coupled with his discussion of non-organic illness behavior, the poor validity of the FCE and his deference to Dr. Bianchini's opinion that Claimant may return to work, which would be therapeutic for Claimant, I find Dr. Applebaum implicitly lifted Claimant's restrictions.

Assuming **arguendo** that Dr. Applebaum implicitly continued his restrictions, I find the preponderance of probative medical opinions indicating Claimant may return to work supports a conclusion that Claimant suffers no physical impediment to return to his prior occupation. As discussed above, I find the medical opinions of Drs. Katz, Glynn and Culver have greater probative value than those of Drs. Watermeier, Phillips, Kewalramani and Morse. They agree Claimant may return to work without restrictions for well-reasoned and compelling reasons, as discussed above. I find Dr. Applebaum's implicit restrictions are not well-reasoned or convincing in the absence of further explanation in his February 24, 2003 report, which indicates Claimant suffers from no neurological impairment, spinal disease or disorder precluding a return to work. Consequently, I am persuaded to conclude Claimant could physically return to his prior occupation without restrictions on February 24, 2003.

It is noted that Claimant's FCE revealed poor results and non-organic illness behavior which reduces the probative value of the FCE in a determination of Claimant's physical restrictions, pursuant to the findings of Dr. Bunch and the medical opinions of record. Accordingly, I find Claimant failed to establish he is physically unable to return to his prior occupation based on the poor FCE results.

Consequently, pursuant to the well-reasoned opinions of Drs. Applebaum, Katz, Glynn and Culver, I find Claimant failed to establish he is unable to return to his prior occupation from February 24, 2003 through the present and continuing. Consequently, Claimant failed to carry his burden of

establishing entitlement to ongoing compensation benefits after February 24, 2003 under the Act.

2. Claimant's Psychological Complaints

A psychological impairment can be an injury under the LHWCA if it is work-related. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255 (1984) (benefits were allowed for depression due to work-related disability); Spence v. ARA Food Serv., 13 BRBS 635 (1980) (headaches resulting from a work-related incident may be compensable under the Act); Tezeno v. Consolidated Aluminum Corp., 13 BRBS 778, 782 (1981), the Board affirmed an award of permanent total disability as a result of the employee's "functional overlay" and "related negative rehabilitation potential"); (quoting Tampa Ship Repair & Dry Dock v. Director, OWCP, 535 F.2d 936 (5th Cir. 1976) (a compensation award for total disability was affirmed where a qualifying opinion that the claimant was totally disabled due to a conversion reaction)). Although a psychological impairment can be compensable, it must be disabling in the economic sense. Conatser v. Pittsburgh Testing Laboratory, 9 BRBS 541 (1978); Winston v. Ingalls Shipbuilding, Inc., 16 BRBS 168, 172 (1984).

Prefatorily, I find the record does not support a conclusion that Claimant suffers from PTSD, pursuant to the opinions of Drs. Culver and Morse, who opined Claimant's injury was of insufficient severity to evoke or cause the disorder. As noted above, Dr. Koy's opinion is entitled to little probative value in light of his unique history of Claimant's injury which is not established in the record. Likewise, Dr. Phillips's conclusion that Claimant might be suffering from a conversion reaction if a psychiatrist would diagnose the malady finds insufficient support in the record, which does not include a psychological or psychiatric opinion that Claimant suffers from the condition or was predisposed to suffer from it, as noted by Dr. Glynn.

On the other hand, I find evidence exists in the record which indicates Claimant might suffer from adverse psychological conditions, namely depression, anxiety and a lack of concentration related to his job injury. Claimant reported symptoms of depression and anxiety to Drs. Watermeier, Bianchini, Kronenberger, Mullener, Koy, Morse and Culver. He reported a lack of concentration with Drs. Kronenberger, Bianchini, Mullener and Morse; however, he did not focus on that complaint with Drs. Koy or Culver. Dr. Kronenberger observed Claimant's lack of concentration was "somewhat below par," while

Dr. Bianchini noted Claimant indicated his concentration problems vary.

Claimant related his weight gain to his depression. Although Dr. Culver attributed the weight gain to Claimant's physical inactivity, he conceded weight gain might be considered an appetite disturbance, which is consistent with Dr. Bianchini's testimony. Claimant's testimony that he suffers depression and anxiety from his job injury is supported by his wife's consistent testimony. However, I find the record does not support a conclusion that Claimant's symptoms are disabling.

Of the psychological and psychiatric opinions of record considering Claimant's psychological condition, Drs. Kronenberger, Koy and Morse opined Claimant was unable to return to work. On the other hand, Drs. Bianchini and Culver opined there is no psychological impairment precluding Claimant from returning to work. Dr. Mullener focused on Claimant's history and IQ, but did not render an opinion on Claimant's ability to return to work.

I am favorably impressed with the opinions of Drs. Bianchini and Culver, which are better reasoned and more persuasive than the others. Their opinions that Claimant's depression is questionable because of the diminished severity of his physical injury are reasonable and supported by multiple diagnoses of a soft tissue injury as well as multiple normal findings on physical and radiographic examination by numerous physicians.

Moreover, Dr. Bianchini's opinion that a return to work would be therapeutic for Claimant is arguably consistent with Dr. Morse's testimony that protracted litigation retards the recovery process by compelling claimants to focus on symptoms related to their conditions. Likewise, Dr. Culver's opinion that Claimant's psychological condition was indeterminable due to malingering is supported by Dr. Katz's findings consistent with malingering. Consequently, I find the opinions of Drs. Bianchini and Culver are well-reasoned and persuasive in establishing Claimant may return to his prior occupation.

On the other hand, Dr. Kronenberger candidly admitted he only reviewed records of Drs. Morse, Bianchini and Mullener. Further, he conceded his opinion could change if he was provided medical records from Drs. Katz, Glynn, Culver and Bunch indicating Claimant was exaggerating his complaints and demonstrating symptom magnification. A review of the record

reveals Drs. Katz, Glynn, Culver and Bunch found no objective basis for Claimant's physical complaints based on diagnostic testing and evaluation, which could have a "huge impact" on Dr. Kronenberger's opinion according to Dr. Kronenberger's testimony.

Moreover, I find Dr. Kronenberger's testimony that Claimant's testing results in areas of depression and anxiety were only slightly elevated, but "not off the charts," is at variance with his testimony elsewhere that Claimant's depression is moderate to severe. Likewise, I find Dr. Kronenberger's opinion that Claimant's concentration was moderately to severely impaired is undermined by his report that Claimant's concentration was only "somewhat below par" and that Claimant's short-term concentration was "adequate."

I find Dr. Bianchini's testimony that Claimant did not "indicate much" concentration difficulty further diminishes Dr. Kronenberger's opinion. It is noted that Claimant did not testify in any great detail regarding problems with concentration. Moreover, I find Dr. Mullener's report that Claimant's reasoning and judgment were adequate and that Claimant revealed no evidence of disorganized thinking diminishes the persuasiveness of Dr. Kronenberger's opinion that Claimant experienced moderate to severe concentration difficulty. Further, I find Claimant's ability to successfully complete the variety of lengthy psychological tests administered by multiple psychologists in this matter arguably buttresses a conclusion his concentration is not severely impaired.

I find Dr. Koy's opinion that Claimant is disabled from an impaired psychological condition, which appears formed on the basis of a "near-death" experience, is not persuasive because the record does not support a conclusion Claimant sustained such an accident. Moreover, I find his opinion is undermined by the cogent and congruent opinions by Drs. Morse and Culver, who specifically disagreed with a finding that Claimant sustained a severe traumatic injury. Accordingly, I find Dr. Koy's opinion is not helpful for a resolution of the matter.

I find Dr. Morse's opinion that Claimant is disabled from a "combined physical and emotional condition" which is the result of his job injury is less convincing than the opinions of Drs. Bianchini and Culver. Dr. Morse failed to adequately describe and correlate the nature of Claimant's job injury and resultant physical condition which would combine with an emotional condition to disable Claimant. As noted above, Dr. Morse's

opinion that no doctors diagnosed malingering is contradicted by the findings and opinions of Drs. Culver and Katz. Likewise, his concession that positive evidence of inconsistencies among Claimant's complaints exists, but was not considered in forming a conclusion, further erodes the value of his opinion.

In light of the foregoing, I find the preponderance of probative medical opinions supports a conclusion that Claimant is not psychologically disabled from returning to his prior occupation. At best, the evidence in this matter is in equipoise, which is insufficient to carry Claimant's burden of production and persuasion, pursuant to Greenwich Collieries, supra. Consequently, I find Claimant failed to establish entitlement to ongoing compensation benefits for a disabling psychological injury.

D. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable

alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., 930 F.2d at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., 930 F.2d at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F.2d at 1042-1043; P & M Crane Co., 930 F.2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F.2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

Of the positions Ms. Favolora identified on October 10, 2002, I find the garage cashier, toll collector and production technician jobs are within the physical limitations and restrictions assigned by Dr. Applebaum in November 2001. None

of the positions require lifting 40 to 50 pounds. Likewise, none of the positions require prolonged bending or stooping. Based on Ms. Favolora's vocational opinion and on the results of Claimant's tests with Drs. Mullener, Kronenberger, Bianchini and Ms. Favolora, I find the jobs are within Claimant's psychological and intellectual limitations.

On the other hand, I find the jobs as an unarmed security guard and customer safety dispatcher are unsuitable occupations in light of Claimant's reading ability. Although Ms. Favolora opined Claimant could read at the fourth-grade level, I am more persuaded by the psychological opinions of record to conclude Claimant's reading ability is less than a fourth-grade level. Dr. Bianchini opined Claimant reads at a third-grade level, while Dr. Kronenberger indicated Claimant might read at the fourth or fifth grade. Having already found Dr. Bianchini's opinion of greater probative value than Dr. Kronenberger's opinion, I am persuaded by Dr. Mullener's supporting opinion that Claimant commands a third-grade reading ability to conclude Claimant reads at the third-grade level.

Ms. Favolora's concession that the jobs as an unarmed security guard and customer safety dispatcher would possibly be inappropriate for Claimant at a third-grade reading ability obscures the likelihood the jobs are suitable for Claimant within his particular limitations and restrictions. See Uglesich v. Stevedoring Services of America, 24 BRBS 180 (1991) (if the vocational expert is uncertain whether the positions which she identified are compatible with the claimant's physical and mental capabilities, the expert's opinion cannot meet the employer's burden). Accordingly, I conclude these two positions do not constitute suitable alternative employment.

Lastly, I find the shuttle bus driver is not a position which is reasonably available to Claimant. The job requires applicants to possess a CDL, which Claimant does not possess. Although Ms. Favolora indicated Claimant could obtain a CDL post-hiring, the record does not establish Claimant may successfully complete the test to obtain a CDL, despite an opportunity to watch videotapes and take the test orally. Moreover, the record does not indicate whether the potential employer is willing to pay for training and taking the CDL test. Consequently, I find the shuttle bus driver is not suitable alternative employment for Claimant within his capabilities.

Additionally, I find Ms. Favolora's testimony that Claimant might suffer impediments to securing and maintaining regular

employment based on assumptions such as Claimant being "seriously limited in maintaining constant attention and concentration and managing work stress" is not convincing in establishing the jobs she identified are unsuitable for Claimant. The record does not support the hypotheses on which Ms. Favolora was asked to rely.

In light of the foregoing, I find Employer/Carrier established three of the six jobs Ms. Favolora identified constitute suitable alternative employment reasonably available to Claimant within his limitations and restrictions on October 10, 2002. Thereafter, I find Claimant's admission that he did not seek employment until January 2003 fails to establish his willingness to work or that he diligently pursued post-injury employment. Accordingly, I find Claimant's permanent disability became partial on October 10, 2002 and lasted until February 24, 2003, when the record indicates Claimant could return to his prior occupation without restrictions, as discussed above.

E. Claimant's Residual Wage-earning Capacity

Given Claimant's age, education, industrial history and availability of employment, I find Claimant's residual wage-earning capacity amounts to the average of the hourly wages of the jobs reasonably available. See Avondale Industries, Inc. v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998)(averaging is a reasonable method for determining an employee's post-injury wage-earning capacity); Louisiana Ins. Guaranty Assoc. v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (averaging salary figures to establish earning capacity is appropriate and reasonable).

Further, the percentage increase in the yearly national average weekly wage should be applied to adjust Claimant's post-injury wages downward because there is no evidence of the actual wages paid by Claimant's post-injury jobs at the time of Claimant's injury. Richardson v. General Dynamics Corp., 23 BRBS 327, 330-31 (1990).

The suitable jobs identified in Ms. Favolora's report include toll collector and production technician positions, which each paid $7.50 per hour. The garage cashier position paid an hourly rate of $6.50. Accordingly, I find Employer/Carrier established suitable alternative employment on October 10, 2002 paying an average hourly rate of $7.17 (($6.50 + $7.50 + $7.50) ÷ 3 = $7.17), or $286.67 for a 40-hour work week ($7.17 x 40 = $286.67).

Taking into consideration the increases in the national average weekly wage between February 25, 2001, the date of accident, and October 10, 2002, the date Employer/Carrier established suitable alternative employment, $287.67 per week on October 10, 2002, equates to $268.64 on February 25, 2001.[43] Thus, as Claimant's pre-injury average weekly wage at the time of accident was $792.00 and his post-injury wage-earning capacity is $268.64, Claimant is entitled to permanent partial disability benefits of $348.87 (($792.00 - $268.64) x .6666 = $348.87), pursuant to Section 8(c)(21). See 33 U.S.C. § 908(c)(21).

F. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

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[43] On February 25, 2001, when Claimant was injured, the national average weekly wage was $466.91. On October 10, 2002, the national average weekly wage was $498.27. A discount rate may be derived by dividing the latter national average weekly wage by the former, which yields 1.0671 ($498.27 ÷ $466.91 = 1.0671). Accordingly, dividing Claimant's $286.67 average weekly wage-earning capacity on October 10, 2002 by the discount rate, 1.0671, yields an adjusted post-injury wage-earning capacity of $268.64 ($286.67 ÷ 1.0671 = $268.64). See U.S. Dep't of Labor, National Average Weekly Wages (NAWW), Minimum and Maximum Compensation Rates, and Annual October Increases(Section 10(f))<http://www.dol.gov/esa/owcp/dlhwc/NAWWinfo.htm> (last accessed November 22, 2003).

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907 (d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

1. Claimant's Choice of Physician

Claimant contends he chose Drs. Vogel, Kewalramani, Phillips, Watermeier, Mullener, Koy, Morse and Kronenberger, whose services were reasonable and necessary for the treatment

of his work-related injury. Employer/Carrier argue Claimant selected Dr. Katz, who opined no further treatment was necessary. Accordingly, they allege Claimant is not entitled to reimbursement for any physicians who were not his treating physician under the Act.

Section 7(b) of the Act provides that an employee shall have the right to choose an attending physician. 33 U.S.C. § 907(b). Section 7(c)(1)(E)(2) of the Act provides that an employee may not change physicians after his initial choice unless the employer, carrier, or deputy commissioner has given prior consent for such change. 33 U.S.C. § 907(c)(1)(E)(2). Such consent shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for and appropriate to the proper care and treatment of the compensable injury or disease. In all other cases, consent may be given upon a showing of good cause for change.

There is no showing that Dr. Katz was Claimant’s choice of physician based on a medical emergency. Rather, Claimant was in no need of immediate emergency care when he completed his choice of physician form in favor of Dr. Katz. From the testimony adduced at trial and the associated correspondence and requests for authorization, I find Claimant requested Dr. Katz as his choice of physician.

I was favorably impressed with the testimony of Ms. Kelly, who indicated that she disclosed her past relationship with WOC and that she presented the choice of physician form to Claimant, who read the form with Ms. Bias before signing the form. Her testimony is corroborated by Ms. Bias’s testimony that Ms. Kelly disclosed her past relationship with WOC. Ms. Kelly’s testimony is further supported by Claimant’s admission that he read the form before he signed it. Likewise, Ms. Kelly’s testimony is supported by Ms. Bias’s testimony that she also read the form and understood it to mean that Dr. Katz was “the doctor that [Claimant] was choosing,” before Claimant signed the form.

Further, I find Ms. Kelly’s testimony that Claimant was not told he must sign the form to receive medical treatment with Dr. Katz is persuasive. Her testimony is supported by Claimant’s testimony that Ms. Kelly did not “twist [his] arm” to obtain his signature that he voluntarily provided. I find Claimant’s admission that he was not told he was precluded from treating with another physician further supports Ms. Kelly’s testimony. Likewise, I find Ms. Bias’s admission that she understood there was no obligation to treat with Dr. Katz supports Ms. Kelly’s

testimony that Claimant was not directed to sign the form in favor of Dr. Katz.

Additionally, Ms. Kelly's uncontroverted testimony that Dr. Katz was not previously selected by Carrier to treat injured employees on behalf of covered employers is persuasive in establishing Dr. Katz is not a physician normally selected by Employer/Carrier to treat injured employees. Consequently, I find Claimant selected Dr. Katz as his choice of physician.

A finding that Claimant chose Dr. Katz as his physician is further supported by Claimant's voluntary treatment on an ongoing basis with Dr. Katz, who ordered radiological examinations and provided a number of modalities of treatments, including injections, medications and a prescription for physical therapy, for which Employer/Carrier paid. Further, Claimant and Ms. Kelly agree that Claimant did not request another physician until March 22, 2001, after Claimant was released to return to work without restrictions by Dr. Katz, who would continue treating Claimant as needed. Consequently, on these facts, I find and conclude Dr. Katz was Claimant's initial choice of physician.

Dr. Katz opined no other medical treatment was necessary for Claimant's condition, but Claimant voluntarily requested treatment with the doctors identified above. Initially, it is noted Drs. Phillips and Watermeier appear to specialize in orthopedics, in which Claimant's physician, Dr. Katz, also specializes. On these facts, I find Claimant failed to establish good cause to change physicians within the same specialty. Moreover, Dr. Katz's opinion that no further medical treatment was necessary is buttressed by the record, which is replete with normal findings by numerous physicians, as discussed more thoroughly above. I find the opinions of Drs. Phillips and Watermeier are neither convincing nor well-reasoned in establishing the cause, if any, of Claimant's ongoing complaints. Consequently, I find Employer/Carrier shall not be liable for their services, which do not appear reasonable, necessary for or appropriate to Claimant's job injury.

A review of the record indicates Claimant chose Dr. Vogel as his treating neurosurgeon. Dr. Vogel's treatment and recommendations against returning to work pending further evaluation is generally consistent with the opinions of Employer/Carrier's own neurosurgeon, Dr. Applebaum, who additionally recommended a physiatrist and assigned physical restrictions against lifting and certain postural movements.

Pursuant to the well-reasoned and cogent opinion of Dr. Applebaum, I conclude Claimant needed no further neurosurgical, diagnostic or therapeutic procedures following November 12, 2001. Consequently, I find Dr. Vogel's treatment through November 12, 2001 was reasonable, necessary for and appropriate to Claimant's job injury. Thereafter, Dr. Vogel's treatment relates to a "suspected" injury which is not established in the record. Accordingly, Employer/Carrier shall be liable for Dr. Vogel's services through November 12, 2001.

I find Claimant chose Dr. Kewalramani as his treating pain specialist. Although Employer/Carrier contend Dr. Ameduri should be considered Claimant's treating pain specialist because Dr. Katz recommended him, I find Dr. Katz's recommendation was provided in response to a recommendation by Dr. Applebaum, who was not Claimant's treating neurosurgeon. I find Claimant's correspondence with Employer/Carrier establishes his desire to treat with Dr. Kewalramani after Dr. Applebaum, who was not Claimant's treating neurosurgeon, recommended a physiatrist. Accordingly, I find Claimant chose Dr. Kewalramani.

From Dr. Kewalramani's initial treatment on December 11, 2001 through his treatment on January 17, 2002, when Dr. Kewalramani reported he was unable to help Claimant and referred Claimant back to Dr. Vogel, I find his services were reasonable, necessary for and appropriate to Claimant's job injury. Thereafter, I find Dr. Kewalramani's follow-up visit on January 15, 2003, when he again reported he was unable to treat Claimant and referred Claimant to Dr. Watermeier, who was not Claimant's orthopedic specialist, does not appear necessary for or appropriate to Claimant's job injury. Consequently, I find Employer/Carrier shall pay for Dr. Kewalramani's treatment from December 11, 2001 through January 17, 2002.

Insofar as the record does not support a finding that Claimant sustained a psychological injury warranting ongoing psychological counseling, as discussed more thoroughly above, I find the remaining doctors with whom Claimant psychologically treated, namely Drs. Kronenberger, Koy, Morse and Mullener, are neither reasonable, nor necessary for nor appropriate to Claimant's job injury. Employer/Carrier shall not be liable for their medical services.

It is noted Claimant submitted pharmacy records indicating prescriptions were filled on various dates. To the extent there are unpaid prescriptions related to Dr. Katz's treatment,

Employer/Carrier shall be liable for reimbursement. Likewise, Employer/Carrier shall remain liable for prescriptions related to Dr. Vogel's treatment through November 12, 2001 and those related to Dr. Kewalramani's treatment from December 11, 2001 through January 17, 2002. Otherwise, Employer/Carrier shall not be liable for prescriptions related to the treatment provided by the other doctors, whose services have not been established as reasonable, necessary for or appropriate to Claimant's compensable injury.

It is further noted that Claimant submitted an invoice for $479.00 from City of New Orleans, Emergency Medical Service (EMS) related to services provided on February 25, 2001, when Claimant was transported from his job site to Touro. (CX-13, p. 1). Claimant was unquestionably treated for his job injury at Touro on February 25, 2001, and Employer/Carrier have not disputed the reasonableness or necessity of the EMS services. Accordingly, Employer/Carrier shall pay any unpaid amounts demanded by EMS related to services performed on February 25, 2001.

2. Recommended Medical Procedures

Claimant argues the following procedures are reasonable and necessary for the treatment of his job injury: (1) treatment at the pain clinic, (2) EMG/NCS, and (3) cervical and lumbar facet arthrogram and block. Employer/Carrier argue the services are unnecessary and inappropriate for the treatment of Claimant's job injury.

As noted above, I find the record supports Dr. Katz's opinion that no further treatment is necessary. Consequently, I find Claimant has not established that any of the proposed medical treatments are reasonable and necessary.

Nevertheless, of the pain specialists of record, I find Dr. Glynn's opinion that a pain clinic would not be helpful for Claimant, based on Claimant's history of psychological exaggeration and somatization, is persuasive and well-reasoned. On the other hand, I find Dr. Kewalrani's apparent recommendation for a pain clinic failed to offer the basis for his recommendation. Of the specialists in neurology and psychiatry, I find Dr. Culver's opinion that a pain clinic is unnecessary in light of Claimant's exaggerated symptoms is consistent with Dr. Glynn's opinion, while I find the opinion of Dr. Morse, who admitted he failed to consider other physicians'

findings of inconsistencies in Claimant's symptoms, is unpersuasive.

Neither of the neurologists recommended a pain clinic, although Dr. Applebaum originally reported a pain management specialist might offer beneficial treatment. Notwithstanding Dr. Applebaum's later finding that Claimant suffers from no disease or disorder which would preclude a return to work, I find the pain management opinions of Dr. Glynn more persuasive than those of Dr. Kewalramani. Consequently, I find Claimant has not established a pain clinic is reasonable or necessary pursuant to the neurological opinions of record.

I find the recommendations for a pain clinic by orthopedists Watermeier and Phillips are not persuasive insofar as their opinions relied on diagnoses of spinal injuries which are not established by the credible evidence of record. As noted above, I am more persuaded in concluding Claimant needs no further treatment by Claimant's orthopedic specialist, Dr. Katz, who treated Claimant shortly after the job injury, considered objective radiological results and other physicians' records, and who was deposed, subject to cross-examination.

Likewise, I find Dr. Koy's recommendation for a pain clinic is neither well-reasoned nor persuasive. As noted above, his description of Claimant's accident and attendant symptoms is not established by the uniform and credible evidence of record. Moreover, his opinion is belied by the congruent opinions of Drs. Morse and Culver, who concluded Claimant did not sustain an injury of the magnitude Dr. Koy described. Accordingly, I find Dr. Koy's recommendation fails to establish the recommended procedure is reasonable, necessary or appropriate for Claimant's job injury.

Although a recommendation for a pain clinic is beyond the area of expertise of the psychologists, it is noted Dr. Kronenberger appears to recommend a pain clinic for psychological benefits. I find his opinion is entitled to less probative value than Dr. Bianchini's opinions for the reasons stated above. Although Dr. Bianchini opined psychological counseling might be of benefit with concurrent physical therapy, he deferred to Dr. Glynn for a recommendation of physical therapy. Otherwise, Dr. Bianchini concluded psychological intervention alone was unnecessary. As noted above, Dr. Glynn opined a pain clinic was unnecessary and that Claimant could return to work without restrictions. Accordingly, I conclude

Claimant has not established a psychological benefit from a pain clinic.

In light of the foregoing, I find the record does not support a conclusion that a pain clinic is reasonable or necessary for the treatment of Claimant's compensable injury. Consequently, Employer/Carrier shall not be liable for such treatment.

Likewise, I find Claimant failed to establish the EMG/NCS recommended by Drs. Phillips, Watermeier and Kewalramani are necessary or reasonable for the treatment of Claimant's compensable injury. Having already found the opinions of Drs. Katz and Glynn better-reasoned and more persuasive than those of Drs. Phillips, Watermeier and Kewalramani, I find Claimant failed to establish the EMG/NCS are reasonable, necessary or appropriate for the treatment of his job injury.

Similarly, I find Dr. Vogel's recommendation for a cervical and lumbar arthrogram and facet blocks is not persuasive in establishing the procedures are reasonable and necessary. Having already found Dr. Applebaum's opinions more persuasive and well-reasoned than those of Dr. Vogel, I conclude the procedures are not necessary for the treatment of Claimant's condition.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, Claimant was injured on February 25, 2001, on the same date Employer received notice of his injury. Employer/Carrier voluntarily paid compensation benefits through March 25, 2001, when they terminated benefits pursuant to the opinion of Claimant's physician, Dr. Katz. Claimant's compensation rate was based on an average weekly wage of $792.00, which is the amount to which the parties stipulated at the hearing. On March 20, 2001, Employer/Carrier filed their Form LS-208, Notice of Final Payment of Compensation Benefits, in which they indicated Claimant was released to return to his prior occupation at the same wage rate.

By voluntarily tendering compensation benefits at an undisputed average weekly wage through March 25, 2001, I find a controversy did not arise until March 25, 2001, when Employer/Carrier disputed Claimant's ongoing entitlement to compensation benefits. Employer/Carrier have continued to dispute Claimant's entitlement to benefits for the grounds asserted in their LS-208, namely that Claimant was released to return to his prior occupation at his prior wage rate. I find Employer/Carrier's March 20, 2001 filing of their LS-208 amounts to the functional equivalent of a notice of controversion, and Employer/Carrier are not subject to penalties under the Act. See White v. Rock Creek Ginger Ale Co., 17 BRBS 75, 78-79 (1984) (an LS-208 may be treated as the functional equivalent of a notice of controversion).

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VII. COST OF LIVING INCREASES

Section 10(f), as amended in 1972, provides that in all post-Amendment injuries where the injury resulted in permanent total disability or death, the compensation shall be adjusted

annually to reflect the rise in the national average weekly wage. 33 U.S.C. § 910(f). Accordingly, upon reaching a state of permanent and total disability on November 12, 2001, Claimant is entitled to annual cost of living increases, which rate is adjusted commencing October 1 of every year for the applicable period of permanent total disability, and shall commence October 1, 2002.[30] This increase shall be the lesser of the percentage that the national average weekly wage has increased from the preceding year or five percent, and shall be computed by the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[44] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

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[30] See Trice v. Virginia International Terminals, Inc., 30 BRBS 165, 168 (1996)(It is well established that claimants are entitled to Section 10(f) cost of living adjustments to compensation only during periods of permanent total disability, not temporary total disability); Lozada v. Director, OWCP, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990) (Section 10(f) entitles claimants to cost of living adjustments only after total disability becomes permanent).

[44] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **February 21, 2002**, the date this matter was referred from the District Director.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from February 25, 2001 to November 11, 2001 based on Claimant's average weekly wage of $792.00, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for permanent total disability from November 12, 2001 through October 9, 2002 based on Claimant's average weekly wage of $792.00, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

3. Employer/Carrier shall pay Claimant compensation for permanent partial disability from October 10, 2002 to February 23, 2003 based on two-thirds of the difference between Claimant's average weekly wage of $792.00 and his reduced weekly earning capacity of $268.64 in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(21).

4. Employer/Carrier shall not be liable for compensation benefits from February 24, 2003 through present and continuing.

5. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's February 25, 2001, work injury, in conformity with this Decision and Order, including Dr. Kewalramani's medical treatment and related prescriptions from December 11, 2001 through January 17, 2002, Dr. Vogel's medical treatment and related prescriptions through November 12, 2001, unpaid prescriptions related to Dr. Katz's treatment and any unpaid balance to the City of New Orleans, Emergency Medical Services, pursuant to the provisions of Section 7 of the Act.

6. Employer shall not be liable for an assessment under Section 14(e) of the Act.

7. Employer shall receive credit for all compensation heretofore paid, as and when paid.

8. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961

(1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

9. Employer/Carrier shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 2002 for the applicable period of permanent total disability.

10. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported and verified fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 25th day of November, 2003, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge